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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-44

ROBERT BURRELL, *et al.*,

Petitioners,

v.

MILTON McCRAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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ON WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Maryland prisoner who alleges violation of his constitutional rights arising out of his imprisonment may be required to exhaust state administrative remedies before being permitted to proceed in federal court under 42 U.S.C. § 1983.
2. Whether the Eighth and Fourteenth Amendment rights of Respondent McCray were violated by Petitioners Burrell and Smith when they subjected McCray to

isolated confinement under severe and harsh conditions.[1]

STATEMENT OF THE CASES

A. Burrell v. McCray and Smith v. McCray

On January 19, 1972, Milton McCray, a state prisoner at the Maryland Penitentiary in Baltimore, filed a *pro se* complaint in the United States District Court for the District of Maryland under 42 U.S.C. §1983 claiming that his constitutional rights had been violated by a prison guard, Robert Burrell, when he, McCray, was locked in an isolation cell and subjected to inhumane conditions of confinement. On February 9, 1972, McCray filed a supplemental *pro se* pleading.

On March 7, 1972, McCray filed another *pro se* civil rights complaint against Bernard D. Smith, alleging that Smith, a guard at the Penitentiary, had subjected McCray to a deprivation of his constitutional rights by arbitrarily confining McCray in an isolation cell under excessively harsh conditions. The complaint against Smith was unrelated to the complaint McCray had previously filed against Burrell.

Counsel was appointed to represent McCray in both cases on about March 16, 1972, and by agreement of all

[1]The Questions presented by Petitioners (Pet. Br. at 9) are different in substance from the questions already presented in the Petition for Writ of Certiorari, and Question 3 is conclusory in that it assumes the adequacy of the proposed state remedy. The Questions suggested by Respondents, *supra*, conform to the questions on which certiorari was granted and are properly expressed in the terms and circumstances of the case. See, Rule 40, Rules of the Supreme Court.

counsel and the District Court, the cases were consolidated. The defendants below filed, through counsel, on May 1, 1972, a joint motion to dismiss each case, principally on the ground that McCray had failed to exhaust an available state administrative remedy by not petitioning the Maryland Inmate Grievance Commission for relief before filing his complaints in federal court.

On June 11, 1973, the defendants' motion to dismiss was heard before the Honorable Edward S. Northrop. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion, and the Court heard legal argument on the question of whether exhaustion could be required in a §1983 action under the circumstances presented by these cases. At the conclusion of the hearing on the defendants' motion, the Court proceeded, on June 12, 1973, to hear the merits of McCray's claims. Testimony was presented over a three-day period.

On October 16, 1973, the Court issued an opinion and order denying defendants' motion to dismiss and denying McCray's claims for relief. In an order filed November 2, 1973, the Court amended its opinion and original order by granting the defendants' motion to dismiss and denying McCray's claims for relief. Judgments were entered accordingly on November 5, 1973. The opinion of the District Court is reported as *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973).

McCray appealed to the United States Court of Appeals for the Fourth Circuit which reached the merits of the cases and reversed the judgments of the District Court. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975) (*en banc*). The Court of Appeals held that McCray's Eighth Amendment rights were violated by Burrell and

Smith and remanded the cases for further proceedings to determine if McCray is entitled to damages or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense.

On April 25, 1974, the Court of Appeals had consolidated McCray's appeals with the appeal of Respondent James E.X. Stokes. See, *infra*. Briefs were filed in the McCray and Stokes cases, and they were argued on June 6, 1974. Subsequently, on June 27, 1974, without the Court having issued a decision, the McCray and Stokes cases were consolidated with the case of Respondent Washington, see, *infra*, for *en banc* consideration by the Court of Appeals.

B. *Boslow and Sorongon v. Washington*

On October 16, 1973, John Washington, a Maryland state prisoner at the Patuxent Institution in Jessup, filed a *pro se* complaint in the United States District Court for the District of Maryland under 42 U.S.C. §1983 claiming that he suffered injuries and deprivations of his constitutional rights as a result of the failure of Petitioner Sorongon, a prison doctor, and Petitioner Boslow, the Director of Patuxent Institution, to provide Washington with necessary medical care. Washington sought declaratory relief and an award of compensatory and punitive damages. He demanded a trial by jury.

The defendants below filed a motion to dismiss Washington's complaint on the sole ground that he had failed to exhaust state administrative remedies by presenting his claim to the Maryland Inmate Grievance Commission. The defendants relied exclusively on the previous decision by the Honorable Edward S. Northrop in *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973).

Counsel was appointed to represent Washington, and on April 4, 1974, a hearing was held before the District Court on the defendants' motion to dismiss. The parties submitted evidence concerning the adequacy of the Inmate Grievance Commission as a state administrative remedy for the purpose of exhaustion (including portions of the record from *McCray v. Burrell, supra*), and the Court heard argument by counsel.

On May 17, 1974, Chief Judge Northrop issued an opinion and order granting the defendants' motion to dismiss. The opinion was subsequently amended on May 22, 1974. Judgment was entered accordingly on May 20, 1974, and Washington made a timely appeal. The opinion of the District Court is reported as *Washington v. Boslow*, 375 F. Supp. 1298 (D. Md. 1974).

Washington appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits.

C. *McClellan v. Stokes*

On December 4, 1973, James E.X. Stokes, a state prisoner at the Maryland Penitentiary in Baltimore, filed a *pro se* civil rights complaint in the United States District Court for the District of Maryland alleging that Petitioner McClellan and other prison officials violated his First and Fourteenth Amendment rights by denying him permission to receive and read two national political newspapers, the "Gay Liberator" and "Akwesasne Notes." On December 17, 1973, Stokes filed a supplemental *pro se* pleading.

The defendants below moved that Stokes' complaint be dismissed for failure to exhaust state administrative

remedies on the authority of *McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973). On April 1, 1974, the District Court granted the defendants' motion and ordered that Stokes' complaint be dismissed without prejudice to institute a further action after having unsuccessfully petitioned the Maryland Inmate Grievance Commission for relief. Judgment was entered accordingly on April 1, 1974.

Stokes appealed to the United States Court of Appeals for the Fourth Circuit which reversed the judgment of the District Court and remanded the case for a determination on the merits. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975).

D. The facts in *Burrell v. McCray*

The district court found that on December 31, 1971, McCray was placed in a cell on the "south wing" of the Maryland Penitentiary. 367 F. Supp. at 1212. The cell had not been cleaned prior to McCray's placement therein and contained "paper, dirty blankets, a metal locker and other trash lying on the floor." *Id.* This refuse was swept by McCray to the front of the cell after his request to have the cell cleaned was denied. On the next morning, January 1st, the trash in McCray's cell caught on fire.[2]

[2] Respondent "alleged that he dozed off with [a] lit cigarette in his hand, and when he awoke the cell was filled with smoke. He testified that he did not set the fire intentionally but he was charged with purposely causing the fire." 367 F. Supp. at 1212. Petitioner Burrell, the "duty captain whose responsibility was the operation and administration of the entire penitentiary on the 8 a.m. to 4 p.m. shift, "*Id.*, testified that he believed McCray may have intentionally set the fire. *Id.* at 1213. The district court made no specific finding resolving this issue.

After a delay in bringing the fire under control (a delay caused in part by a faulty fire extinguisher) McCray was taken to the infirmary to be treated for burns caused by the fire. Burrell, stating that he believed that McCray had intentionally set the fire,[3] concluded that McCray was "mentally unstable" and ordered his placement in a "mental observation" cell. *Id.* at 1213. McCray was promptly taken to that cell, stripped of all clothing, and placed in it. The mental observation cell was a completely bare "strip" cell which had concrete walls, a concrete ceiling, and a tile floor. The windows were covered with sheet metal, but the cell had an electric light. This cell was without furnishings of any kind and had an "oriental" toilet, a hole in the floor six to eight inches across, which flushed automatically from outside the cell and was "covered by a removable metal grate which was encrusted with the excrement of previous occupants." 516 F.2d at 367. McCray was continually confined in this cell without clothes or blankets for approximately two days, even though the floor was so cold it was "impossible to sleep." *Id.* During this time McCray was not seen by a physician, nurse, psychiatrist, psychologist, or any other medical personnel.[4] Nor was McCray "permitted to

[3] Petitioner Burrell testified that he "was informed by Sgt. Witte that Inmate McCray had set his cell on fire." App. 171a.

[4] Petitioners state in their Brief (at 94) that "Mr. Musk, the institutional psychologist, acknowledged that he was familiar with the incident and the fire in January, 1972, and *that he saw respondent in the isolated confinement area.* (T.383-84)" (Emphasis added). This contention, however, is entirely inconsistent with the district court's finding that a psychologist did *not* see McCray while he was in the mental observation cell, 367 F. Supp. at 1213, and Mr. Musk's own testimony that he was on vacation and out of the institution until January 4, 1972. (App. 131a). Mr. Musk did testify, however, that he had interviewed Mr. McCray on many occasions, both at the Penitentiary (App. 112a) and while Mr. McCray was a prisoner at Patuxent. (App. 114a; 62a).

bathe, shave, have or use articles of personal hygiene, including toilet paper," or receive reading or writing materials. *Id. See also*, App. 147a-151a, 154a. In sum, McCray spent approximately 48 uninterrupted hours without clothes in a totally barren cell.

E. The facts in *Smith v. McCray*

On November 19, 1971, (App. 74a), McCray was confined in a cell on the "street side" of the "south wing" of the Maryland Penitentiary. 367 F. Supp. at 1211. Because this cell was in an "unsanitary condition,"[5] *Id.* McCray complained to petitioner Smith, a sergeant on the day shift (8 A.M. - 4 P.M.) and the officer in charge on the "south wing". App. 74a, 77a. Sergeant Smith then removed McCray to the lowest tier of the "south wing", *Id.* where McCray was, fortuitously, able to air his complaints with the warden. App. 48a. After McCray communicated his complaints to the warden he was moved to another cell on the "yard side" of the "south wing". The warden ordered petitioner Smith to make available to McCray all books and materials kept in his regular cell. 367 F. Supp. at 1211; 516 F.2d at 365.

When McCray did not receive his law books, he began "hollering and yelling", 367 F. Supp. at 1211, creating a "substantial disturbance". *Id.* Petitioner Smith then transferred McCray to the "isolated confinement area (I.C., known to the inmates as the 'hole')", *Id.*, in order to prevent a "greater disturbance". *Id.* While McCray was

[5] McCray testified without contradiction that the cell was "filthy," with "trash, dirt, torn mattresses, [and] parts of mattresses on the floor." (App. 47a).

being transferred he began "shouting insults and threatening to do bodily harm to himself". *Id.* Petitioner Smith interpreted these threats "as an indication of mental and emotional instability". *Id.* McCray was thereupon (at 11:30 A.M. on November 20) placed without clothes in a concrete, isolated confinement cell which was completely bare of any furnishings except for a toilet, sink, recessed light, and a "one foot high concrete slab, 6 to 8 feet long and 3 feet wide, which was McCray's bed." 516 F.2d at 365. While McCray was furnished with no bedding or blankets upon his initial placement in the isolated confinement cell, 516 F.2d at 365-366, during the night, a prison guard gave him a mattress. "McCray testified that it was so cold that he tore open the mattress, which was old and deteriorated, and dug a channel down in the cotton so that he could sleep nestled in the mattress. Subsequently, McCray was disciplined for destroying the mattress." *Id.*

On the morning of November 21st petitioner Smith re-entered the isolated confinement area where McCray was confined and "found that he had defecated into a cup and smeared feces over himself and the cell wall". *Id.* After having McCray bathed and the cell scrubbed, McCray was returned to the isolated confinement cell for another 24 hours, and the penitentiary psychologist was notified. On the next day, November 22nd, McCray was returned to his regular cell since, according to Smith, he "started acting alright". *Id.*

During the approximately two days McCray spent confined in the isolated confinement cell he was denied his clothing and, with the exception of the mattress, all other material goods including articles with which to clean himself and the cell, reading material and writing material. He was "fed in plastic cups during this two day period". *Id.*

SUMMARY OF ARGUMENT

The scope of 42 U.S.C. §1983, its availability to state prisoners, its relationship to state administrative grievance procedures, and the federalism and comity questions raised by that relationship, are, according to Petitioners, undecided issues which are capable of resolution through the instant litigation. Petitioners further claim that the increased number of prisoner lawsuits, which have been filed in the federal courts, can be decreased by a ruling from this Court favorable to the prisoner grievance mechanism established by the State of Maryland. The Attorneys General of thirteen other states have filed an amicus brief urging the Court to accept Maryland's contentions.

Respondents agree that the heavy caseloads of federal courts and the need for speedy and effective resolution of prisoner complaints are matters of national concern. Respondents do not agree, however, that the Maryland Inmate Grievance Commission provides an answer to those problems, and more importantly for this case, Respondents do not agree that the scope, availability and purposes of 42 U.S.C. §1983 are in doubt, or that the questions raised by Petitioners can or should be addressed by this Court in the present case.

Respondents will first establish that the cases at bar do not present the factual context necessary for a resolution of the questions proposed by Petitioners. Two of the four cases, *Burrell v. McCray* and *Smith v. McCray*, have been decided on the merits by the District Court and the Court of Appeals. In addition, because they and *Boslow, et al. v. Washington*, are exclusively damage cases, the Inmate Grievance Commission is clearly an inadequate state remedy, and therefore, the Court need not, and should

not, reach the broader question of whether the Commission would be an adequate state remedy under other circumstances.[6] Furthermore, in *McClellan, et al. v. Stokes*, where equitable relief is requested, resolution of the issues raised by the complaint does not involve the exercise of any agency expertise, but rather, the issues require a judicial determination in the first instance.

The proposition that prisoners may be treated differently from all other §1983 complainants through the imposition of an exhaustion requirement cannot be maintained. See, *e.g.*, *Cruz v. Beto*, 402 U.S. 319 (1972). Respondents will establish that the history of 42 U.S.C. § 1983, both legislative and judicial, clearly supports the decision of the Fourth Circuit in the instant cases. *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975). Petitioners also suggest that recent "exceptions" to the rule of non-exhaustion in §1983 cases indicate the appropriateness of creating an exception in prisoner cases. Petitioners, however, misconstrue the cases they cite, and generalize from them to an untenable position which would deny state prisoners due process of law.[7]

Considerations of comity and federalism, which Petitioners also urge as a basis for an exhaustion requirement,[8] have been reviewed by this Court in the context

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[6] *McClellan, et al. v. Stokes* is also a claim for damages as well as injunctive relief.

[7] For example, Petitioners rely on *Gibson v. Berryhill*, 411 U.S. 564 (1973), which, if suggesting an exception to the no-exhaustion rule at all, concerns concepts of finality and ripeness and applies only to the exhaustion of prospective remedies rather than retrospective remedies such as the Inmate Grievance Commission. Similarly, Petitioners refer to *Preiser v. Rodriguez*, 411 U.S. 475 (1973), as "a new departure" (Pet.Br. 85) when, in fact, *Preiser* specifically rejected the suggestions put forth by Petitioners in the present case. See, *e.g.*, 411 U.S. at 492 n.10.

[8] Petitioners' principal argument seems to be that since Maryland has created an Inmate Grievance Commission, the federal courts should require §1983 litigants to resort to it.

of §1983 complaints and prisoner cases, but such considerations have never been allowed to restrict the access of a proper §1983 plaintiff to the federal courts, since to create such a restriction would violate the Congressional mandate and the long judicial history of §1983 which has affirmed that the federal courts are the principal protectors of the constitutional rights of all citizens. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961). If the scope of §1983 is to be altered, it should be done by Congress with a statutory amendment rather than by this Court with a judicial decree.

The District Court decision was based in part on the supposition that requiring Maryland prisoners to file their constitutional claims with the Inmate Grievance Commission would reduce the Court's caseload. As Respondents point out, *infra* in Part II.D., those expectations are illusory, and an exhaustion requirement will not bring about any real benefits to the federal courts. In addition, there is a variety of alternative means by which the federal courts can efficiently manage the prisoner caseload without this Court having to take the drastic and unprecedented action of requiring exhaustion of state remedies in an action properly brought under §1983. There are also many administrative methods which the state prison systems may employ to reduce the need for prisoners to resort to the federal courts for relief. Further, to require exhaustion of the inadequate remedy proposed by the State in this case would only serve to "brush under the rug the problems of those who are found guilty and subject to criminal sentence."[9] Even if an exhaustion rule were to be created for prisoner §1983 cases, the procedures and operation of the Maryland

[9]Chief Justice Burger. *Our Options Are Limited*, 18 Villanova L. Rev. 165, 167.

Inmate Grievance Commission do not satisfy the minimum standards of due process which have to be met by a state administrative remedy if it is to be the subject of an exhaustion requirement.

The district court held full evidentiary hearings in *McCray v. Burrell*, No. 74-1042, and *McCray v. Smith*, No. 74-1043, to review allegations by McCray that his confinement in a "mental observation" cell (*Burrell*) and an "isolation" cell (*Smith*) denied him, in each instance, federally protected rights. The court concluded that in neither case had McCray been subjected to unconstitutional treatment. Reversing, the United States Court of Appeals for the Fourth Circuit found in McCray's action against Burrell, two violations of the Eighth Amendment: "First, the record reveals that the conditions of confinement in the mental observation (M.O.) cells in which McCray was kept fall far short of the current standards of decency of present-day society." 516 F.2d at 369. Second, even assuming that the conditions of isolated confinement did not constitute a *per se* violation of the Eighth Amendment, the deprivations, discomforts and suffering resulting from such confinement should have been alleviated, and less barbarous means of protection should have been provided by Burrell. *Id.* The failure of Burrell, upon learning that expert medical help was not forthcoming for McCray within a reasonable period of time, to devise and employ means to protect McCray from injuring himself other than by continued isolation while being deprived of clothing and elements of personal hygiene, violated McCray's right to be free from cruel and unusual punishment.

In McCray's suit against Smith, the Court of Appeals held that although a prisoner, who exhibits a mental condition which suggests that he may harm himself or

others, may be removed from the general population and subjected to protective measures, the confinement of McCray, naked, in isolation, for two days, without any immediate effort by Smith to obtain a prompt medical evaluation and necessary treatment for McCray, violated his Eighth Amendment rights. *Id.* at 368-69. While recognizing that the isolation of a prisoner for his own protection and the safety of the prison may be a rational means to reach a permissible end, the confinement of McCray, under the conditions and for the length of time in this case, without securing medical attention for him, was arbitrary, unreasonable and unnecessary. See, *Id.* at 368 n.3.

In both *Burrell* and *Smith* the initial decision to separate McCray from the general prison population was based upon the prison officials' judgment that such action was necessary to preserve institutional security and order. The confinement of McCray in isolation was not for punishment, however, but for his own self-protection. Burrell and Smith offered as justification for the nature and conditions of isolated confinement in these cases, the need to protect McCray from self-injury.

The Court of Appeals, however, rejected that rationale. First, the *conditions* (and length) of confinement in the solitary cells, and the *process* by which the confinement was imposed did not bear any reasonable relationship to the purpose of the confinement. See, *e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *O'Connor v. Donaldson*, ____ U.S. ____, 95 S.Ct. 2486, 2493 (1975). Second, the conditions which existed in the solitary cells are not consistent with minimal concepts of human dignity and evolving standards of decency and are not acceptable to contemporary society. See, *e.g.*, *Furman v. Georgia*, 408 U.S. 238, 277, 291 (1972).

At the time of McCray's confinement in isolation, there was in effect a Maryland Division of Correction regulation which governed the use of solitary confinement, but it was not followed by Burrell or Smith. The Court of Appeals found that "[i]n permitting [solitary] confinement, the prison directive comports with the eighth amendment," 516 F.2d at 368, but when the measures taken to protect a prisoner from self-injury are isolated, naked, in a barren cell, as in these cases, the directive also states the constitutional minimum in requiring that if medical and psychological help is "not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided." *Id.* at 369.

Petitioners argue that the Court of Appeals erred because it elevated a prison regulation to constitutional dimension and found that mere violation of such a regulation by a prison official entitles a prisoner to relief in federal court. These claims misconstrue the Fourth Circuit's decision and obfuscate the issues before this Court. The analysis used by the Fourth Circuit in looking to standards adopted by administrators as a benchmark of minimum constitutional requirements is an established judicial technique and recognizes the proper deference which the federal courts give to prison officials in the administration of state prisons.

I.

THE DECISION BELOW SHOULD BE AFFIRMED WITHOUT THIS COURT REACHING THE BROAD QUESTION OF WHETHER A STATE PRISONER MAY BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BEFORE BEING PERMITTED TO PROCEED IN FEDERAL COURT UNDER 42 U.S.C. §1983.

This case concerns four separate and distinct actions which were filed by three Maryland prisoners against prison officials alleging violations of the plaintiffs' constitutional rights. All of the cases were filed in proper person in the United States District Court for the District of Maryland under 42 U.S.C. §1983. They were dismissed on the ground that the plaintiffs had not exhausted state administrative remedies by petitioning the Maryland Inmate Grievance Commission for relief.

Although the State of Maryland is apparently anxious to have this Court decide the question of whether the exhaustion of administrative remedies may be required of a state prisoner in an action properly brought under §1983, that issue need not be decided in any of these cases. The decision of the Court of Appeals can and should be affirmed on narrower grounds.[10]

A. *Burrell v. McCray* and *Smith v. McCray*

McCray filed civil rights actions against Burrell and Smith who subjected McCray to cruel and unusual pun-

[10] It is well established that this Court "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (Citation omitted). *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936). Mr. Justice Brandeis, concurring. See also, *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

ishment and a denial of due process of law when, on two separate occasions, McCray was needlessly and arbitrarily locked into isolation cells under excessively harsh conditions of confinement. In each case, McCray requested damages for the injuries he sustained and for violations of his constitutional rights.

The District Court appointed counsel to represent McCray, and after a three-day trial, ruled against McCray on the merits. The Court of Appeals also reached the merits of both cases in reversing the judgments of the District Court and remanding the cases for further proceedings to determine if McCray is entitled to damages or if Burrell and Smith may avail themselves of a qualified immunity and good faith defense. Under these circumstances, it would be duplicative and wasteful for McCray to have to begin his cases all over again before the Inmate Grievance Commission.

Furthermore, the Commission cannot grant McCray the relief he seeks because the Commission does not have the authority to award either compensatory or punitive money damages. See, Petitioners' Brief, p. 19. See also, *McCray v. Burrell*, 516 F.2d 357, 365 (4th Cir. 1975); *Washington v. Boslow*, 375 F.Supp. 1298, 1300 (D. Md. 1974).

An administrative remedy is deemed to be inadequate, and therefore, not subject to the exhaustion requirement, when the agency is not empowered to grant effective relief. *Gibson v. Berryhill*, 411 U.S. 564, 575 n. 14 (1973). In addition, this Court has held that "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." *Preiser v. Rodriquez*, 411 U.S. 475, 494 (1973). See also, *Ray v. Fritz*, 468 F.2d 586, 587 (2nd Cir. 1972); *Jones v. Decker*, 436 F.2d 954 (5th Cir. 1970).

An award of damages is a significant, if not the principal, means of protecting a citizen's constitutional rights from violations by government officials. This Court has held that where a person's home was invaded by federal agents, who ransacked it and subjected the people who lived there to innumerable indignities, "[i]t will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief. . . . For people in Bivens' shoes, it is damages or nothing." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409-410 (1970). In fact, it has been forcefully argued that the civil rights statutes can best be enforced by providing damages for violations of the Fourteenth Amendment. Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 Tex. L. Rev. 1019 (1967).

> "The availability of damages is a matter of particular importance to the poor. By definition and experience, civil liberties for them are matters of crucial economic significance. Yet the poor have insufficient impact upon the agencies providing them welfare, housing, medical, police, and educational services, to effect policy changes through customary channels, such as political, administrative, or legislative appeals. As a consequence they are subject to recurring abuses. The best corrective for such abuses is a remedy in damages, which compensates for injuries and deters future misconduct." LaFrance, *Federal Litigation for the Poor*, Ariz. St. Univ. L.J. (1972) 20, 60.

Indeed, what better deterrent is there to prevent a prison guard from treating prisoners in the brutal manner in which respondent McCray was treated if it is not the threat of damages?

There is substantial reason to believe that even if McCray were forced to file his claims with the Inmate

Grievance Commission, the Commission would not rule upon them. In a deposition of the Commission's Executive Director (App. 283a), he described how a complaint analogous to McCray's claims was summarily dismissed without a hearing.

(290a)

Q. All right. What other complaints, if any, did he [the prisoner] raise in that letter [to the Commission] besides those two? A. That his punishment is disproportionate to his offense.

Q. That is No. 3. That is all there is to No. 3? (35) A. Do you want me to read the whole thing?

Q. It's a little difficult—you're right, that is nonspecific. A. "In accordance with Wright versus McMann, 460 F.2nd 126 (2nd Cir. 1972) 'No punishment disproportionate to the offense (and therefore cruel and unusual).' I was put into a cell with no bed, blanket, sheet—just a sink and toilet and I had all clothes taken from me."

Now, as a result of experience, what he means by that is that he was thrown into the hole for a brief period of time as a result of something that he did that caused the administration to think he needed a cooling-off period.

Q. Does that raise—that again doesn't raise a substantial question for the Grievance Commission? It cer-

(291a)

tainly isn't lacking in specificity. A. It isn't? It is to me.

Q. You just related exactly what happened to him. He was thrown into the hole. A. All he is saying here is that he was thrown in the hole and that is punishment disproprotionate to the (35A) offense.

Q. And your position upon reading that is that simply is not punishment disportionate to the offense?

(Mr. Stutman) One must know what the offense is.

(The Witness) That's right. I don't know what the guy is talking about.

Q. That's what I'm getting at, Mr. Lusby. I don't mean to spend so much time on this particular case, but now that this comes up, I'm wondering why this man didn't have a hearing? A. We tried three times to get him to tell us and this is the type of thing that we get.

Q. Well, this letter that you are reading now is his most recent letter, is that right? A. That's right.

Q. And his third allegation, as I understand from what you read, is that he was placed into what you referred to as the hole, I think he said isolation, for an unspecified period of time. A. And I imagine he's on M-1 now, administrative segregation.

(36) Q. Was this case investigated? Is there anything in the file that indicates it was investigated? A. No, because I don't consider he ever filed a specific grievance.

Q. Has the question of being put in isolation at Patuxent ever been litigated before the Commission? A. Just the mere placing of a person in isolation?

Q. Yes. A. No. The question has arisen several times as to whether it was proper in the circumstances for that patient. You see, what I'm trying to get across to you, if he would say something like that, then we've got a grievance.

(292a)

Q. Well, is the complaint that you received from him so much different from the complaints you normally receive from inmates? A. Yes.

Q. In what respect? A. They usually tell me what's bothering them and what they want done about it, what they think the administration or the institution has done wrong and what they want (37) done about it. This guy never tells me.

Q. Well, in the normal course of affairs, the Inmate Grievance Commission investigates complaints that come into the office, is that right, most complaints? A. Right.

Q. And again, I don't mean to argue with you about this case, but it appears to me—let me ask you in the form of a question. Doesn't it appear to you now, looking back at this file, at least No. 3, we talked about No. 1 and No. 2, but at least grievance No. 3 is a substantial question? Although admittedly it's not pleaded with the greatest degree of specificity, he does plead that he was placed into isolation under rather serious conditions of confinement, and he is raising the question of whether that punishment was disaproportionate to whatever offense he was put in there for, and my question is, isn't that an issue that the Grievance Commission can deal with? A. What you have stated is an issue that the Inmate Grievance Commission can deal with.

Q. Isn't that what is in the letter? A. All I can say, Mr. Morgan, is maybe he's trying (38) to say that, but he doesn't say it.

Q. Are there any complaints raised in that letter besides those three, Mr. Lusby? A. "Decent conditions in solitary confinement."

Q. Is that a quote– A. By that –

Q. Is this point No. 4? A. Yes.

Q. Maybe you could read point No. 4? A. "In accordance with Landman versus Royster, 338 F.Supp. 621 (E.D. Va. 1971). I am allowed 'decent conditions in solitary confinement,' which was denied me."

(293a)

What he is saying there is he doesn't like the fact –he doesn't like the conditions on administrative segregation. Once again, we have heard many specific cases with regard to administrative segregation.

Q. Does he use the term there administrative segregation? A. No.

Q. He uses the term solitary confinement? A. Yes.

(39) Q. From your experience at Patuxent, there is a difference between solitary confinement and administrative segregation, isn't there? A. He's talking about segregation, I would say.

Q. Well, it's possible– A. Once again, we're talking about this vague thing, you know. You are asking me to give answers and I've got to–I'm trying to imagine what it is and, as a result of my experience, I think he's talking about M-1, administrative segregation.

Q. And that is commonly referred to as solitary confinement? A. Yes.

Q. It is? A. Yes.

Q. All right. With regard to point No. 4, what you are saying is that the complaint was dismissed, if I read correctly what your answer was, the complaint was dismissed because the conditions of administrative segregation at Patuxent have already been raised before the Commission and the Commission has already issued a (40) ruling on those conditions? A. Yes, several.

The hopelessness and futility of McCray's pursuing his claims through the Inmate Grievance Commission are further evidenced by the Commission's statistic that of 19 complaints decided by the Commission through February 28, 1974, made by prisoners claiming some physical mistreatment by guards, the Commission found all 19 complaints to be wholly without merit. See, App. 338 and the deposition of Dene L. Lusby at 150. Exhaustion is unnecessary under such circumstances. See, *Evans v. Cunningham*, 355 F.2d 491 (4th Cir. 1964); *Woods v. Steiner*, 207 F.Supp. 945, 954 (D. Md. 1962).

B. McClellan, et al. v. Stokes

Stokes filed a complaint under 42 U.S.C. §1983 seeking an injunction against enforcement of the censorship policies at the Maryland Penitentiary and damages for interference with his First Amendment rights. The District Court dismissed Stokes' complaint without an adjudication on the merits, but nevertheless, exhaustion of administrative remedies should not be required in his case.

First, the Inmate Grievance Commission cannot award damages to Stokes. See, Part I.A., *supra*.[11] Second, Stokes' claim for equitable relief is based on his challenge to Maryland Division of Correction regulations which he alleges are unconstitutional on their face. A resolution of these issues does not involve the exercise of any agency expertise or discretion, and therefore, exhaustion should not be required. See, *U.S. ex rel. Brooks v. Clifford*, 412 F.2d 1137, 1140 (4th Cir. 1969); *U.S. ex rel. Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659 (3rd Cir. 1973), rev'd on other grounds, 417 U.S. 653 (1974). *Cf., McKart v. United States*, 395 U.S. 185 (1969).

A second factor leading us to hold that the administrative remedy was inadequate is that the constitu-

[11] It is very possible that the Commission would dismiss Stokes' equitable claim without even affording him a hearing. The Commissioner's Executive Director testified in his deposition about an analogous case where a prisoner at Patuxent Institution claimed that his out-going mail should not be subjected to censorship. The grievance was administratively dismissed without a hearing on the grounds that a prison regulation permitted such censorship ("Because we have heard many cases relating to mail privileges and I am familiar completely with the mail rules, and his statement that his outgoing mail is not subject to censorship is totally incorrect." App. 289.) and similar claims had been heard before by the Commission and rejected. (App. 288-90).

> tional issues raised by this case, particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators (footnote omitted). *Plano v. Barker*, 504 F.2d 595, 599 (2nd Cir. 1974).

The Maryland Inmate Grievance Commission is not equipped, nor should it be required, to perform what is a purely judicial function. See, *Wills v. United States*, 384 F.2d 943, 945 (9th Cir. 1967), cert. denied, 392 U.S. 908 (1968).[12]

C. Boslow, et al. v. Washington

John Washington filed a complaint in the District Court under §1983 alleging that he had sustained a broken rib which a prison doctor refused to treat. Washington was in pain for several months, and his rib healed improperly as a result of being denied medical care. Washington requested declaratory relief and an award of compensatory and punitive damages. He demanded a jury trial. The District Court dismissed Washington's complaint without deciding the merits of his claims because Washington had not applied for relief from the Inmate Grievance Commission.

Washington should not be required to resort to the state administrative agency for relief. The Inmate Grievance Commission is an inadequate remedy because it cannot award money damages. See, Part I.A., *supra*. In addition, an exhaustion requirement would serve no

[12] "[W]here a statute is attacked on its face as denying a right; in that instance, there would be no need for the application of agency expertise with the development of a factual record." Petitioners' Brief, p. 80, n. 31.

purpose at all since Washington has demanded a jury trial. This Court had held, under analogous circumstances, where both legal and equitable issues are present in a case, that only under the most imperative conditions (none of which the Court could anticipate), can the right to a jury trial of the legal issues be lost through a prior determination of the equitable claims. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962). See also, *Ross v. Bernhard*, 396 U.S. 531 (1970). Even if the Commission were to hear Washington's case and make a declaration that Washington's claims are meritorious or not meritorious, he would be entitled to return to federal court for a jury trial of all the issues. Under the rationale of *Dairy Queen*, the Commission's findings would be inadmissible as evidence before the jury, and the exhaustion requirement would have been merely a needless exercise in futility.

II.

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DECIDING THAT A MARYLAND PRISONER, WHO ALLEGES VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS ARISING OUT OF HIS IMPRISONMENT, MAY NOT BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES BY PETITIONING THE MARYLAND INMATE GRIEVANCE COMMISSION FOR RELIEF BEFORE BEING PERMITTED TO PROCEED IN FEDERAL COURT UNDER 42 U.S.C. §1983.

A. A long and uniform series of Supreme Court decisions which should not be overruled hold that the federal courts have the primary responsibility for securing the federal rights of all citizens including those affected by administrative action.

It was the specific intent of Congress in enacting 42 U.S.C. §1983 that the protection of federal rights not be made to depend upon any state remedies, either judicial or administrative, whether available or adequate, in theory or in practice. *Mitchum v. Foster*, 407 U.S. 225, 239-242 (1972); *Zwickler v. Koota*, 389 U.S. 241, 245-247 (1967); *Conover v. Montemuro*, 477 F.2d 1073 (3rd Cir. 1973). At the end of the Civil War in 1965, the Ku Klux Klan, formed in 1866, conducted a reign of terror and violence that prompted President Grant to ask Congress for legislation to alleviate the problem. *District of Columbia v. Carter*, 409 U.S. 423, 426-429 (1973). Congress responded with §1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13. The Act was later codified as 42 U.S.C. §1979, and, later, as 42 U.S.C. §1983. No major revisions occurred with either codification.

In a series of decisions beginning with *Monroe v. Pape*, 365 U.S. 167 (1961) and continuing through *Huffman v. Pursue*, 420 U.S. 592 (1975), the Supreme Court has established the rule that exhaustion of state administrative remedies is unnecessary in a civil rights action brought under 42 U.S.C. §1983. The federal remedy is supplementary to any state remedies. The Court has strictly adhered to the principles that the adequacy or availability of a State remedy is irrelevant, and that civil rights plaintiffs may invoke the jurisdiction of the federal courts for the initial review of their complaints.

> We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492:
>
> > "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963).

In *McNeese*, the specific holding of the Court was that the purposes of 42 U.S.C. §1983 would be defeated "if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672. Subsequently, in *Damico v. California*, 389 U.S. 416 (1967) (*per curiam*), the Court interpreted *McNeese* to include the principle that

> "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." (brackets in original). 389 U.S. at 417.

See also, *Carter v. Stanton*, 405 U.S. 669 (1972); *Metcalf v. Swank*, 406 U.S. 914 (1972).

It may be argued that the holding in *McNeese*, standing by itself, did not fully resolve the question of whether there are circumstances when exhaustion of state administrative remedies may be required in a §1983 case since the Court appeared to qualify its holding by adding that

> [m]oreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. 373 U.S. at 674-75.

In *Damico*, however, the three-judge District Court whose decision was reversed by the Supreme Court had found that the plaintiffs had " 'failed to exhaust *adequate* administrative remedies.' " (emphasis added). 389 U.S. at 417.[13]

The next occasion on which the Supreme Court considered the question of whether exhaustion of state remedies may be required in a §1983 action was in a case brought by a Pennsylvania state prisoner who alleged that prison officials had violated his constitutional rights by confiscating his legal papers and materials. The Court reviewed the nature of the state administrative remedy and held that

> [i]n light of this it seems likely that to require petitioner to appeal to the Deputy Commissioner of Correction, the Commissioner, or to the Attorney

[13] The dissenting opinion of Mr. Justice Harlan in *Damico* confirms that there was an adequate state administrative remedy available to the plaintiffs. The majority of the Court, however, held that exhaustion of that remedy was unnecessary.

> General would be to demand a futile act. In any event, resort to these remedies is unnecessary in light of our decisions in Monroe v. Pape; McNeese v. Board of Education; and Damico v. California. (full citations omitted). *Houghton v. Shafer*, 392 U.S. 639, 640-41 (1968) (*per curiam*).

As in *McNeese*, where the Court appeared to qualify its decision by finding that the state remedy was inadequate, the Court in *Houghton*, while holding that resort to state administrative remedies was unnecessary, also found that exhaustion of state remedies under the circumstances there would be an exercise in futility. In *Wilwording v. Swenson*, 404 U.S. 249 (1971) (*per curiam*), however, this Court foreclosed the possibility that its prior holdings could be interpreted to mean anything other than that exhaustion may not be required under 42 U.S.C. §1983 regardless of whether the state remedy is adequate.

Wilwording v. Swenson was a case brought under §1983 by state prisoners challenging prison conditions and disciplinary measures taken against them while confined in maximum security. The Court reaffirmed *Monroe v. Pape*, *McNeese v. Board of Education* and *Damico v. California* and cited them for the proposition that the remedy provided by the Civil Rights Act "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Furthermore, the Court held that

> [s]tate prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d. 1319 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such ad-

ministrative appeals was noted, we held that in "any event, resort to these remedies is unnecessary." (citation omitted). 404 U.S. at 252.

The most recent decisions of the Supreme Court specifically approve the holdings of the earlier cases that the exhaustion of state administrative remedies may not be required in an action brought under §1983. Mr. Justice White delivered the opinion of the Court in *Gibson v. Berryhill*, 411 U.S. 564 (1973):

> . . . . This Court has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C., § 1983. McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967).

In *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974), Mr. Justice Brennan wrote for the Court:

> When federal claims are premised on 42 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

The decision in *Steffel v. Thompson, supra*, was explained by Mr. Justice Blackmun writing for the Court in *Ellis v. Dyson*, 421 U.S. 426 (1975):

> Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement. (citations omitted).

Petitioners suggest that the decision in *Huffman v. Pursue*, 420 U.S. 592 (1975), which concerned an appli-

cation of the principles of *Younger v. Harris*, 401 U.S. 37 (1971), indicates that there may be circumstances under which this Court would depart from the long-established principle that exhaustion of state administrative remedies may not be required in a § 1983 action; however, Mr. Justice Rehnquist, writing for the Court, stated that "[b]y requiring exhaustion of state appellate remedies for the purposes of applying *Younger*, we in no way undermine *Monroe v. Pape* (citation omitted)." 420 U.S. at 609, n.21.

In their discussion of the *Monroe* decision and its progeny, Petitioners refer to *District of Columbia v. Carter, supra*, for the proposition that the scope of §1983 must be narrowly measured by the purposes of its enactment. (Pet. Br. at 44 n.15). From that hypothesis, Petitioners argue that §1983 may be limited now because it was enacted in response to situations which existed during and after the Reconstruction Era; that is, the problems addressed by the 1871 Congress are not relevant today.

Petitioners have reached the wrong conclusion. Indeed, this Court cited *Monroe* with approval when it held that the legislation passed by the 1871 Congress was not solely to deal with the actions of the Ku Klux Klan but was also intended to modify Congress' former reliance on the states to assure the enforcement of federal Constitutional rights.

> "With the growing awareness that this reliance had been misplaced, however, Congress recognized the need for original federal court jurisdiction as a means to provide at least indirect federal control

over the unconstitutional actions of state officials." *District of Columbia v. Carter*, 409 U.S. at 428.[14]

The need for federal court supervision over the enforcement of federal rights by the states has been reiterated by this Court several times. In *Procunier v. Martinez*, 416 U.S. 396, 405 n.9 (1974), for example, this Court described the difficulties inherent in federal court review of state prisoner litigation and supported the development of "internal administrative procedures for disposition of inmate grievances," but the Court further held that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims arising in a federal or state institution." *Id.*[15]

[14] The 1871 Congress had several options available to it but rejected them all in favor of making the federal remedy supplementary to any state remedy. For example, civil rights litigants could have been limited to the secessionist states; federal court jurisdiction could have been conditioned on a showing that federal rights would not be enforced by the states (compare, 28 U.S.C. §1443, the removal statute); or, the lower federal courts could have been vested with appellate jurisdiction to review state decisions (see, *Monroe v. Pape, supra* at 195-98, Mr Justice Harlan, concurring). The Congress did not resort to these or other alternatives but rather, it reversed its previous reliance on the states as guarantors of constitutional rights and vested this duty in the federal courts. *District of Columbia v. Carter, supra* at 427-28. See, Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law and Contemp. Prob. 216, 230 (1948).

[15] In *McNeese v. Board of Education, supra* at 674 n.6, this Court said:

> "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." [*Stapleton v. Mitchell*, 60 F. Supp. 51, 55 (D. Kan. 1945)].

See, generally, Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1356-58 (1970).

Petitioners also argue that *Monroe v. Pape* was incorrectly decided in finding access to the federal courts for enforcement of constitutional claims to be supplementary to any state court remedy.[16] They cite Mr. Justice Frankfurter's dissent in *Monroe* to support their argument (Pet. Br. at 45-46) which appears to be that whenever there exists an available and adequate state remedy, it must be exhausted before the plaintiff may gain access to federal court. Not only did the majority reject that argument in *Monroe*, but the concurring Justices and Mr. Justice Frankfurter, in dissent, rejected it as well.

> Manifestly the applicability of the section in an action for damages cannot be made to turn upon the actual availability or unavailability of a state law remedy for each individual plaintiff's situation. Prosecution to adverse judgment of a state court damage claim cannot be made prerequisite to § 1979 [§1983] relief. In the first place, such a requirement would effectively nullify §1979 as a vehicle for recovering damages. (footnote omitted). In the second place, the conclusion that police activity which violates state law is not 'under color' of state law does not turn upon the existence of a state tort remedy. *Monroe v. Pape, supra* at 246, Mr. Justice Frankfurter, dissenting.

[16] It is certainly late in the day to launch an attack on the correctness of *Monroe v. Pape* in light of the numerous Supreme Court cases which have followed it, the inaction on the part of Congress in legislatively modifying it and the absence of any compelling reason to overrule it. See, *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). Compare, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

[17] Mr. Justice Frankfurter then gave the following example of cases in which the propriety of a §1983 action would be unquestioned: "If [a plaintiff] can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, §1979 [§1983] will apply. See *Hague v. C.I.O.*, 307 U.S. 496. . . ." *Id.* Arguably, all actions taken by prison officials would fall within this description.

In their concurrence, Justices Harlan and Stewart read the legislative histroy of §1983 to support the conclusion that the availability or adequacy of a particular state remedy is irrelevant. *Id.* at 197. They concluded that "a deprivation of a constitutional right is signficantly different from and more serious than a violation of a state right and therefore deserves a different remedy, even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* at 196.

The substantial and uniform series of decisions by this Court since *Monroe v. Pape* establishes the rule that in an action brought under 42 U.S.C. §1983, the plaintiff may not be required to exhaust state remedies before being permitted to proceed in federal court. The plaintiff need not exhaust a state administrative remedy even where the remedy is available and adequate. "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording v. Swenson*, 404 U.S. at 252.[18]

[18] The decision below, a unanimous decision by the Court of Appeals *en banc*, is based upon settled law and is clearly correct. See also, *Jones v. Metzger*, 456 F.2d 854, 856 (6th Cir. 1972); *Beale v. Blount*, 461 F.2d 1133, 1139 n. 11 (5th Cir. 1972); *Shelton v. Union County Board of Commissioners*, 483 F.2d 1406, 2 Prison L. Rptr 578 (7th Cir. 1973) (unpublished *per curiam* opinion); *Brooks v. Center Township*, 485 F.2d 383, 386 (7th Cir. 1973); *McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972); *Raper v. Lucey*, 488 F.2d 748, 751 n. 3 (1st Cir. 1973); *Conover v. Montemuro*, 477 F.2d 1073, 1079 (3rd Cir. 1973); *Padilla v. Ackerman*, 460 F.2d 477, 479 (9th Cir. 1972); *Gillette v. McNichols*, 517 F.2d 888, 890-91 (10th Cir. 1975).

v. *Preiser v. Rodriguez*, 411 U.S. 475 (1973), establishes the rule that a state prisoner may not be required to exhaust state administrative remedies before proceeding under 42 U.S.C. §1983 with a challenge to the conditions of confinement.

In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), this Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." The Court's decision turned on the question of "whether the specific federal habeas corpus statute [28 U.S.C. §§2241 and 2254], explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies." *Id.* at 489.[19] The Court looked to congressional intent in deciding the issue.

> In amending the habeas corpus laws in 1948, congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement,

[19] The prisoner plaintiffs in *Preiser* were seeking restoration of good time credits alleging that such a cause of action could be brought under the broad language and literal terms of §1983.

and that specific determination must override the general terms of §1983. *Id.* at 489-90.[20]

The underlying issue of principal importance of the parties in *Preiser* was whether the prisoner plaintiffs had to exhaust state remedies before being permitted to proceed in federal court. The Supreme Court could have held that all prisoner complaints must be treated by the federal courts as habeas corpus petitions with the attendance exhaustion requirements. That expansive approach was rejected, however, and the Court limited its decision in holding that habeas corpus is the exclusive federal remedy only when a prisoner's action lies at the "core of habeas corpus." *Id.* at 489.[21] On the other hand, "a §1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.* at 499.[22]

[20] The Court noted that there are circumstances where habeas corpus may be an alternative remedy to a proper action under §1983, but it did not hold that any such action must be brought under habeas corpus with its attendant exhaustion requirements. *Id.* at 498-99. See also, *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974); *Humphrey v. Cady*, 405 U.S. 504, 516-17 n. 18 (1972); *Gerstein v. Pugh*, 420 U.S. 103, 107 n. 6 (1975).

[21] As Mr. Justice Brennan pointed out in his dissenting opinion,

> "the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy." *Id.* at 503.

[22] The Court noted that habeas corpus is not an appropriate or available federal remedy for a damage claim, and accordingly, "a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies." *Id.* at 494.

This Court should not go beyond the holding in *Preiser* in requiring prisoners to exhaust state remedies in actions brought under 42 U.S.C. §1983. First, in *Preiser*, the Court found an "explicit congressional intent" which would have been "wholly frustrate(d)" had the respondents there been permitted to evade the exhaustion requirement of 28 U.S.C. §2254(b) by "the simple expedient of putting a different label on their pleadings." *Id.* at 489-90. In the present case, there is no specific federal statute which conflicts with the broad language of §1983.

Second, despite the Court's recognition in *Preiser* of the strong federal-state comity considerations, which are the basis of an exhaustion rule, in cases involving disputes between prisoners and state prison officials, *Id.* at 491-92, the Court declined to hold that exhaustion may be required in all such actions. The dissenting opinion in *Preiser* argued, *inter alia*, that the challenges to the actions of the prison administration which were made by the prisoners in that case were no different, in terms of the potential for exacerbating federal-state relations, from the attacks made by the petitioners in *McNeese v. Board of Education*, *Damico v. California* and *Monroe v. Pape*, *supra*, on the various state administrative actions in those cases; therefore, they argued, since exhaustion was not required there, it should not be required under the circumstances of *Preiser*. See *Preiser v. Rodriguez*, *supra* at 492 n. 10.

The Court responded to the dissenting Justices by finding that exhaustion was required in *Preiser* only because of the congressional judgment reflected in the habeas corpus statutes.

> The answer [to the argument made by the dissent], of course, is that in those cases [*McNeese*, *Damico*

> and *Monroe*], brought pursuant to §1983, no other more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however, the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific determination in §2254(b) that requiring the exhaustion of adequate state remedies in such cases will best serve the policies of federalism. *Id.* at 492 n. 10.

The Court did not respond to the question raised in the dissenting opinion by holding that the comity considerations in cases involving prisoners and prison officials are so overwhelming, or that such cases involve relationships so unique, that a special rule of exhaustion is necessary for prisoners, as Petitioners urge in the present case. Therefore, Petitioners are quite clearly incorrect when they conclude that the decision in *Preiser* indicates that "if responsible States develop responsible programs," exhaustion of these "programs" would be required by this Court. Petitioner Brief, p. 60. It is not the availability or adequacy of a state remedy which determines whether a prisoner should be required to exhaust it.[23] While *Preiser* reflects the Court's concern for the difficult comity considerations underlying federal actions brought by state prisoners against prison officials, *Preiser* also establishes that an exhaustion rule will not be imposed unless there is an explicit congressional determination that requiring exhaustion will best serve the policies of federalism.

[23] The no-exhaustion rule of *Monroe v. Pape*, *supra* at 183, "in no way depends upon the inadequacy of state remedies." *Rodriguez v. McGinnis*, 456 F.2d 79, 82 (2nd Cir. 1972), rev'd, *sub nom. Preiser v. Rodriguez*, *supra*, Judge Kaufman, concurring.

C. The Constitutional Right To Access To The Courts May Not Be Restricted To Serve The Interests Of Administrative Efficiency.

The District Court suggested that an exhaustion requirement for prisoners in §1983 cases has become necessary because of the burden which has been placed upon the federal courts by prisoner petitions and complaints. *McCray v. Burrell*, *supra* at 1193-94. Such a requirement would mean that prisoners are held to a stricter standard of exhaustion than any other civil rights plaintiffs. What is at stake in this case is not merely an abstract question of law which, if decided adversely to Respondents, will cause them the temporary inconvenience of having to resort to a state forum. The District Court's decision was, in effect, a declaration that the constitutional rights of prisoners will no longer be protected by the federal courts.

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 411 (1970), Mr. Justice Harlan, concurring.[24]

[24] The courts will not sanction a refusal to accept jurisdiction of diversity cases because of congested court dockets. See, *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883, 886 (2nd Cir. 1946), rev'd on other grounds, 330 U.S. 501. See also, *Thermtron Products, Inc. v. Hermansdorfer*, ____ U.S. ____, 44 L.W. 4085 (1/20/76).

In one of the earliest prisoner civil rights cases to come before the Court of Appeals below, the government made the argument that to permit a prisoner to be heard on his claims in the District Court would be to "encourage a flood of such petitions." *Sewell v. Pegelow*, 291 F.2d 196, 198 (4th Cir. 1961). The Court rejected that argument, and the rationale for its decision is plainly applicable to the present cases:

> "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." (citation omitted). *Id.*

See also, *Johnson v. Glick*, 481 F.2d 1028, 1030 (2nd Cir. 1973). A similar concern about a potential plethora of groundless claims was expressed by Mr. Justice Frankfurter, dissenting in *Monroe v. Pape*, *supra* at 240 n. 68; however, the argument did not alter the result reached by the Court.

The District Court below concluded that one of the reasons an exhaustion requirement is necessary is because some prisoners have abused the federal process by filing a large number of groundless complaints. *McCray v. Burrell*, 367 F. Supp. at 1195. Merely because some members of a class of litigants may assert frivolous claims, however, the entire class may not be excluded from court. This Court rejected this "frivolity" argument in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and suggested an alternate remedy of imposing sanctions in specific lawsuits rather than barring the litigation wholesale. *Id.* at 381-382. See also, *Delorme v. Pierce Freight Lines Co.*, 353 F. Supp. 258, 260 (D. Ore. 1973).

This Court has recently declared that "[t]he constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to

seek redress for violations of their constitutional rights." *Procunier v. Martinez*, *supra* at 419. See also, *Wolff v. McDonnell*, *supra* at 579; *Ex parte Hull*, 312 U.S. 546, 549 (1944).[25] The due process right to access to the courts applies to civil rights actions under 42 U.S.C. §1983. 418 U.S. at 579-80. A fundamental principle within the concept of due process of law is that the government may not single out a group or class of individuals for discriminatory treatment unless there is good reason to do so,[26] and when such discrimination places a burden on a fundamental constitutional right, it may only be justified by a compelling governmental interest.[27]

The District Court decisions below placed a substantial burden on the right of Maryland prisoners to access to the courts, and Chief Judge Northrop forthrightly articulated his rationale for imposing the burden:

> "It is clear . . . that when the federal courts sit as the initial forum for any prisoner who alleges a deprivation of his constitutional rights, an allegation often totally without merit, a tremendous amount of court time is required to dispose of the action." *McCray v. Burrell*, *supra*, 367 F. Supp. at 1195.

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[25] In *Ex parte Hull*, the Court held unconstitutional a practice of prison officials which required that all petitions and complaints by prisoners be "screened" before being submitted to the courts. This Court has since found other impediments to access to be unconstitutional. See, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969), prohibition against prisoners assisting one another in preparing court documents; *Procunier v. Martinez*, *supra*, bar against law students and paraprofessionals assisting prisoners.

[26] The discrimination at issue in this case came as the result of federal court action; therefore, the Fifth Amendment rather than the Fourteenth Amendment is applicable. See, *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

[27] See, *Frontiero v. Richardson*, 411 U.S. 677 (1973).

Putting aside for the moment the vitality of the assumptions involved here, and the efficacy of the proposed cure, the question is whether judicial efficiency is a "compelling" reason in the constitutional sense for restricting prisoner access to the federal courts. A short response is available: ". . . [A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." (footnote omitted). *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 647 (1974). And, as the Court stated in *Frontiero v. Richardson, supra* at 690:

> In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656, 31 L.Ed.2d 551, 92 S.Ct 1208 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct 1322 (1969); *Carrington v. Rash*, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct 775 (1965).

In his separate opinion below, Judge Widener suggested two arguments to support his view that prisoners should be required to exhaust state remedies in §1983 cases. First, he posited that this Court's decision in *Wolff v. McDonnell, supra*, held that "the rights of a state prisoner under § 1983 are not coextensive with those of any other person," and that *Wolff* "created a separate class for prisoners." 516 F.2d at 376. It is quite true that this Court found in *Wolff*, as it did in *Pell v. Procunier*, 417 U.S. 817 (1974), and *Procunier v. Martinez, supra*, that the interests of prisoners under the Constitution must be

balanced against the legitimate and identifiable state interests in prison administration, but this is not a unique analysis,[28] and it does not mean that prisoners, as a class, may be treated differently from all other civil rights litigants with regard to the availability of the federal courts as the principal protector of constitutional rights.

Second, Judge Widener suggested a kind of reverse equal protection analysis, which would work to the detriment of prisoners who have proper §1983 claims, when he suggested that since exhaustion is required in habeas corpus cases, where liberty may be at stake, exhaustion should also be required in §1983 cases where the challenge is to conditions of confinement. Under this analysis, prisoners again would be subjected to a restriction on their right to access to the courts which is applicable to no other §1983 plaintiff. This Court rejected such a result in *Preiser v. Rodriguez, supra*, where it discussed the comity considerations which underly an exhaustion rule, in the prison context, and concluded that the demands of federalism do not require prisoners to exhaust state remedies in cases challenging the conditions of confinement.

Respondents do not mean to derogate the value of and benefits to be derived from wise judicial management, but the pursuit of efficiency cannot be permitted to

[28] See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (public high school); *Healy v. James*, 408 U.S. 169 (1972) (college); *United States v. O'Brien*, 391 U.S. 367 (1968) (military).

contravene the fundamental constitutional rights of any class of citizens.[28a]

D. A Requirement That Prisoners Exhaust A State Administrative Remedy In §1983 Cases Will Not Result In Any Real Benefits To The Federal Courts.

The decisions of the District Court below were premised, in part, on the assumption that requiring Maryland prisoners to petition the Inmate Grievance Commission for relief before filing actions under 42 U.S.C. §1983 would alleviate the burden which prisoner complaints were perceived to be on the federal courts. See, *McCray v. Burrell*, 367 F. Supp. at 1193, 1201; *Washington v. Boslow*, 375 F. Supp. at 1303-04. An exhaustion requirement, however, will not bring about any substantial

[28a]Petitioners argue that the Maryland courts have always been willing to adjust state law to conform to constitutional decisions, and that Maryland is sensitive to the constitutional rights of state prisoners. (Pet. Br. at 70). Petitioners conclude that with an exhaustion requirement in §1983 cases to assist them, they will have the "tools to finish the job." (*Id.* at 91). Respondents have been unable to discover any Maryland appellate decision which affords relief to a prisoner in a case concerning the conditions of confinement. See, *Wilwording v. Swenson*, 404 U.S. at 250. In *State v. McCray*, 267 Md. 111, 129-134 (1972), the Court of Appeals catalogued all of the cases in which prisoners have been denied relief and concluded: "The short of it is that in this State the courts have steadfastly refused to review the complaints of persons confined in Patuxent and the various penal institutions, for the reason that the redress of grievances of the inmates was for the executive branch of the government." See also, *Hopkins v. McClellan*, ____ F. Supp. ____, 18 Cr.L. 2318 (D. Md., 12/11/75), where the district court had to compel Maryland prison officials to obey the clear mandate of this Court's decision in *Procunier v. Martinez*, *supra*.

benefits in terms of reducing the number of actions filed, screening out frivolous complaints or increasing the efficiency with which the federal courts can manage prisoner cases.

Respondents recognize that the number of petitions and complaints filed by state prisoners in the federal courts has increased during the past several years. Prisoner cases, however, should not be made the "scapegoat" for problems which are largely beyond the control of the litigants and the courts.[29] There has been a dramatic rise in all filings, particularly bankruptcies, for example, and the possible unnecessary involvement of the federal courts in diversity cases has also expanded the judicial work load.[30]

The courts can efficiently manage prisoner complaints by using the several means which are already available.[31] In addition, the litigation of a civil rights action often involves the expenditure of a relatively small amount of judicial resources.[32]

During the fiscal year ended June 30, 1972, in the United States District Courts, there were a total of 2877 state prisoner civil rights actions terminated of which 2644 were disposed of before pretrial and of which 97 (3.4%) reached trial. *Report of the Director of the*

[29]It is to be expected that the explosion in prison populations, for example, has a proportionate effect on the number of prisoner grievances.

[30]See, footnote 48 and text, *infra*.

[31]See, Respondents' Brief, Part II.E., *infra*.

[32]It has been found that "most of the successful section 1983 cases present simple fact situations with a clear issue of federal law requiring limited, if any, evidentiary hearings." Chevigny, *supra*, at 1354. Also see McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 2 Wis. L. Rev. 523 (1975).

Administrative Office of the United States Courts (1972) at A-23. The following year, 3500 such actions were terminated of which 3213 were disposed of before pretrial and of which 173 (4.9%) reached trial. *Report* (1973) at A-23.

In the District of Maryland during the fiscal year ended June 30, 1972, a total of 1756 civil cases (omitting land condemnation cases) were terminated of which 6.2% reached trial. *Report* (1972) at A-24. In the Fourth Circuit, 9.3% of a total of 8304 cases terminated were tried. *Id.*

During the next fiscal year, the figures were as follows:

	Total Civil Cases Terminated	Per Cent Tried
District of Maryland	1616	7.9%
Fourth Circuit	8509	9.8%

Report (1973) at A-24.

To summarize, during 1972 and 1973, of the total state prisoner civil rights actions terminated in the district courts, 3.4% and 4.9%, respectively, reached trial. By comparison, for the District Courts in the Fourth Circuit, during 1972 and 1973, of all civil cases terminated, 9.3% and 9.8%, respectively, were tried. It is therefore apparent that less than 5% of state prisoner civil rights cases require evidentiary hearings,[33] and the burden of evidentiary hearings in prisoner civil rights cases is significantly less than in all other civil cases.

[33] In *Wingo v. Wedding*, 418 U.S. 461, 473 n.20 (1974), this Court referred to statistics in the *Report of the Director of the Administrative Office of the United States Courts* (1973) which indicate that "[i]n 1973, of the 10,800 prisoner petitions filed for habeas corpus or as §2255 motions to vacate sentence, less than 5%, or approximately 530, necessitated evidentiary hearings." The Court concluded, therefore, that "... it does not appear that judges will be significantly overburdened by the requirement that they personally conduct evidentiary hearings."

There are means available to reduce the workload of the federal courts without imposing an exhaustion rule on state prisoners,[34] and as Respondents point out, *infra*, the role of the courts in defining the rights and responsibilities of prisoners and prison officials, and any efforts of the states to create grievance mechanisms to which prisoners will resort voluntarily, will have the natural effect of reducing the amount of prisoner litigation.

The District Court stated recurrently in the decisions below that prisoner actions are often frivolous. See e.g., *McCray v. Burrell*, 367 F. Supp. at 1195, 1201; *Washington v. Boslow*, 375 F. Supp. at 1300.[35] The Court argued that "if there is available a viable administrative remedy, then the spurious claims will be weeded out, and the district courts will be called upon to hear only those cases that are clearly of constitutional dimension." *McCray v. Burrell, supra* at 1201. An exhaustion requirement, however, will not achieve that desirable result.

Petitioners indicate that during the period from July 1, 1971 through June 30, 1974, of the 1680 complaints received by the Inmate Grievance Commission, only 191 (11.4%) were found to be meritorious by the Commis-

[34] For example, the number of federal judges can be increased. See, Chief Justice Burger's Year-End Report on the Condition of the Judiciary, *infra*, n. 48. See also, *Rodriguez v. McGinnis, supra* at 81-82, Judge Smith, concurring.

[35] Compare, *Rodriguez v. McGinnis, supra* at 84, Judge Oakes, concurring: "It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions–indeed, many have been highly meritorious." "Although many of the prisoner claims are frivolous, some raise constitutional issues of great difficulty and importance. These seem clearly to merit the attention of the federal judiciary. [footnote omitted]. Federal judicial attention to these constitutional issues over the course of the past decade has had a profound effect upon prison management and prison life. Viewed in this perspective, the prisoner rights cases aggregately have great significance both for the individual inmate and for the correctional system generally." Remington, *State Prisoner Litigation and the Federal Courts*, 1974 Arizona St. L.J. 549, 551.

sion.[36] (Pet. Br. at 89). Presumably, many complainants whose cases are dismissed or found to be without merit by the Commission will file their grievances in federal court.[37] In addition, because the Commission has no authority to award damages, it is an inadequate state remedy in cases where damages are sought as relief, and all such cases will proceed to the federal court.[38]

The District Court suggested that the Grievance Commission will screen out the claims that are clearly of constitutional dimension for the District Court. Whether this state agency can be relied upon to identify constitutional issues or to understand and apply federal law,

[36] It is unclear how many of these 191 decisions were subsequently reversed by the Secretary of the Maryland Department of Public Safety and Correctional Services under the statutory authority granted the Secretary to review the Commission's decisions. See Article 41, §204F(f)(2). Similarly, there is no way to determine whether the relief granted in the 191 cases was sufficiently responsive to the prisoners' requests to make continuation of the cases in the federal court unnecessary.

[37] It is possible an exhaustion requirement will have the opposite effect from that which was anticipated by Chief Judge Northrop. It may be that the Commission will "weed out" the valid claims, where it has the authority to grant relief, but the "spurious" claims will continue to "flood" the District Court.

[38] The Commission does not even have the authority or jurisdiction to award compensation to a prisoner who alleges that his personal property was lost or stolen as the result of the negligence or intentional conduct of prison officials. See, *Lee Avon Johnson, et al. v. Robert J. Lally*, No. 9934 Law. Docket 16 (Cir. Ct. for Wash. Cnty. Md., 1/28/76). Resp. Br., Addendum A. Lost property cases represent 13% of the Commission's total caseload (Pet. Br. at 42), but in view of the *Johnson* decision, all such cases may be filed in federal court without an exhaustion requirement since the state remedy is inadequate. These minor prisoner grievances, which are similar to the case concerning the missing seven packs of cigarettes to which reference was made by Chief Justice Burger in his Report on the Federal Judicial Branch, delivered before the ABA (8/6/73), are beyond the jurisdiction of the Commission.

however, is highly questionable.[39] These tasks are the responsibility of the federal judges to which their expertise is uniquely suited.[40]

In short, the Commission will not significantly reduce the number of federal actions filed or effectively insure that those actions which are filed are of constitutional dimension. The only conceivable efficiency which would seem to follow from an exhaustion rule is that some prisoners may become literally exhausted by the duplicative and tortuous requirement of pursuing relief through the Grievance Commission and forfeit their federal remedy altogether.

Another benefit which the District Court perceived as attending an exhaustion requirement for Maryland prisoners was that having petitioned the Inmate Grievance Commission, a prisoner would come to the federal court with the issue of liability clearly defined on the record. *McCray v. Burrell, supra* at 1210. Furthermore, the court could then "readily dispose of the litigation in the same manner in which it now handles habeas corpus petitions." *Id.* In *Washington v. Boslow, supra* at 1302, the Court

[39] Mr. Justice Frankfurter, in *Brown v. Allen*, 344 U.S. 433, 501-02 (1953), raised the issue of the difficulty which the federal courts have in finding constitutional claims in poorly presented petitions.

[40] Under the Inmate Grievance Commission statute (Article 41, §204F(e), and in practice, when complaints are received from prisoners, they are subjected to a preliminary review by the Executive Director (App. 283-295), and if upon such review, a complaint is determined to be on its face wholly lacking in merit, it may be dismissed without a hearing or specific findings of fact. Approximately 55% of the grievances received are dismissed in this manner. (Pet. Br. at 89). The Executive Director exercises the preliminary review power, but in his deposition, he was unable to articulate any standards which he uses for review. See also, Pet. Br. at 28-29.

went on to add that ". . . the state procedure would sharpen the issues and furnish a record which, if necessary, could be supplemented in this United States District Court on the damage claim." The purpose of the Commission record would be to serve as a preliminary indicator of the validity of a claim, to expedite cases by alerting the Court to those cases in which constitutional deprivations are likely to have occurred and by moving them into the regular trial calendar, and to be employed by the Court to arrive at the central issues for trial, thereby significantly reducing the trial time involved. *Id.* at 1300.

The Grievance Commission record, however, cannot be used by the federal court to serve these purposes or to dispose of civil rights in the same manner in which habeas corpus petitions are handled, as Chief Judge Northrop has suggested.[41] There is serious doubt whether a district court, vested with original jurisdiction over civil rights complaints, may make use of the record developed by a state administrative agency or the decision of that agency, in deciding a civil rights case properly brought before it.

The District Court's decision is so unique in this regard, *inter alia*, that there is little, if any, law on the question of whether, or to what extent, it is permissible to use a state administrative record in a §1983 case. Several principles are clear, however. First, an analogy to habeas corpus petitions is inappropriate because in those cases, Congress has explicitly authorized the federal courts to presume that a determination made by a state court is correct unless a showing can be made to the contrary.[42] The presumption specifically applied only to

[41] As a preliminary matter, it is clear that there would not be many records for submission to the District Court since only about 44% of the complaints filed with the Commission go to a hearing. (Pet. Br. at 89).

[42] See, 28 U.S.C. §2254(d). Cf., *Townsend v. Sain*, 372 U.S. 293 (1963).

state court proceedings,[43] and the standard of review is less restrictive than that which is used in judicial review of administrative agency decisions.[44]

Second, the findings of the Inmate Grievance Commission would be of little use in a subsequent §1983 action. As the District Court conceded, "a determination of the Grievance Commission or the state courts on the merits of a prisoner's claim is not binding on this Court. . . ." *Washington v. Boslow*, 375 F. Supp. at 1300. Principles of *res judicata* and collateral estoppel do not operate in a §1983 case to bar an Article III court from making its own determination of facts and adjudication of rights of the parties where the prior decision was by a state administrative agency. See, *Lombard v. Board of Education*, 502 F.2d 631, 635-37 (2nd Cir. 1974), cert. denied 420 U.S. 976 (1975). See also, *Wageed v. Schenuit*, ____ F. Supp. ____, 44 L.W. 2307 (D. Md., 12/11/75) (no *res judicata* effect to a state administrative agency determination in a subsequent action under 42 U.S.C. §1981).[45] It would appear, in fact, that a §1983 litigant raising constitutional claims is entitled to a *de novo* hearing by

[43] 28 U.S.C. §2254(d). See also, *Townsend v. Sain, supra* at 314-15, where the Court relied on "the coequal responsibilities of state and federal *judges* in the administration of federal constitutional law" (emphasis added) in establishing the federal review standards.

[44] Compare, e.g., the habeas standard set by the Court, "fairly supported by the record as a whole" with the APA standard, "unsupported by *substantial* evidence." *Townsend, supra*, 372 U.S. at 313; 5 U.S.C. §706(2)(e).

[45] The rules of collateral estoppel and *res judicata* are particularly inappropriate in this case because in Maryland, hearsay evidence may be the sole basis for the decision of an administrative agency. See, *Fairchild Hiller Corp. v. Supervisor of Assessments*, 267 Md. 519, 523 (1973).

the federal court.[46] *Cf., Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). In *Holiday v. Johnson*, 313 U.S. 342 (1941), this Court held that under the federal Habeas Corpus Act, a federal judge, and not a commissioner, must make *de novo* findings of fact and conclusions of law in a prisoner habeas corpus case. See, *Id.* at 352, 353-54. In *Wingo v. Wedding, supra*, the Court specifically rejected the argument that reference to a magistrate was dictated by court congestion, thereby reaffirming the necessity of an original hearing by a federal judge.[47]

To summarize, it appears that the anticipated efficiencies upon which the District Court predicated its decisions to require exhaustion are largely illusory:

1. An exhaustion rule will not substantially reduce the total number of cases filed in the Maryland federal court unless the rule itself poses such a barrier to prisoners that they are coerced by it into forfeiting their federal remedy.

2. The Inmate Grievance Commission will not significantly assist in accomplishing the desired result of assuring that the only cases filed in federal court are of constitutional dimension.

3. The record or findings of fact, if any, of Inmate Grievance Commission proceedings will not be useful to the federal court in the management or litigation of prisoner civil rights actions.

[46] Whatever may be the limitations on a district court judge in using the record or findings of a state administrative agency, it is clear that such materials could not be used where the litigants were entitled to a trial by jury. See, *Dairy Queen v. Wood, supra* at 472-73; *Ross v. Bernhard, supra; Tights, Inc. v. Stanley*, 441 F.2d 336, 337 (4th Cir. 1971). The District Court recognized that if there is a right to a jury trial, a prior resort to the Inmate Grievance Commission will not prejudice the right: "These administrative proceedings will not estop the plaintiff from having those issues appropriate for jury resolution fully tried before a jury." *Washington v. Boslow, supra* at 1300-01.

[47] In *LaBuy v. Howes Leather*, 352 U.S. 249 (1957), this Court refused to sanction the referral of a federal claim to a special master where the referral was made because of the congested court docket.

E. An Exhaustion Requirement For Prisoner Civil Rights Actions Is Unnecessary In Light Of The Availability Of Meaningful Alternatives Which More Effectively Serve The Interests Of The Parties And The Federal Courts.

The enormous workload of the federal courts is a reality that cannot be ignored, and about a sixth of the cases on the civil dockets of federal courts are petitions from prisoners.[48] It is therefore understandable that Chief Judge Northrop would like the Inmate Grievance Commission to be the answer to at least some of the litigation filed in the Maryland District Court.[49] There

[48] See Chief Justice Burger's Year-End Report, *The Condition of the Judiciary* (January 3, 1976).

[49] Prisoner litigation, of course, is not the only, or even the most significant, cause of the increased court work. Bankruptcies, for example, rose 34.3% in fiscal 1975, leaving 262, 282 such cases awaiting decision at the end of the year, and diversity cases represent nearly 20% of the District Court caseload. *Id.* Further, as Chief Judge Northrop has recently announced, *all* civil filings in the District of Maryland have increased 27% since 1974, while bankruptcy filings have increased 61% and criminal proceedings, 14%. In terms of the amount of time consumed by the different types of cases processed, the "multi-party, complex antitrust and patent litigation," in combination with the protracted trials of multi-count, multi-defendant "white collar" offenses appear to shadow all other matters. Address of the Honorable Edward S. Northrop, Chief Judge, U.S. D. Md., at the Mid-Winter Meeting of the Maryland Bar Association, January 9, 1976. *The Daily Record, Baltimore*, January 12, 1976.

are effective means, however, by which the federal courts can handle prisoner cases without resorting to the drastic action of requiring the plaintiffs to exhaust state remedies.

The decisions by this Court and the lower federal courts have already decided many of the constitutional issues which typically arise between prisoners and prison officials.[50] In *Procunier v. Martinez*, 416 U.S. 396, 407 (1974) for example, the Court formulated a standard of review for prisoner mail censorship in order to reduce repetitive, piecemeal litigation by prisoners and to make it unnecessary for federal courts to be perpetually involved in the affairs of prison administration. See also, *Wolff v. McDonnell, supra; Pell v. Procunier*, 417 U.S. 817 (1974). There is reason to believe that " 'the development of clear cut codes of prisoners' rights and responsibilities [will] also serve to eliminate many grievances before they [arise], and to stop prison officials from violating what should be uncontested rights.' " Coulson, *Justice Behind Bars: Time to Arbitrate*, ABA Journal, June, 1973, quoting from an address by Judge Weinstein. More specifically, the Eighth Circuit recently issued the following admonition:

> With the definitive guidelines of minimal due process requirements now set forth in *Wolff v. McDonnell* (citation omitted), the claims concerning denial of procedural due process in prison disciplinaries should now disappear. We assume all prison authorities will establish disciplinary procedures meeting at least the basic requirements set forth there. *Willis v. Ciccone*, 506 F.2d 1011, 1017 n. 6 (1974).[51]

[50] An important effect of the decision in *Preiser v. Rodriguez, supra*, will be to substantially reduce the number of constitutional claims which prisoners may litigate under 42 U.S.C. §1983. See, *Schneckloth v. Bustamonte*, 412 U.S. 218, 260 n. 14 (1973), Mr. Justice Powell, concurring. This has a significant impact on the courts' work because "a very high percentage of the habeas corpus petitions can be, and are, disposed of on the face of the petition or after submission of a paper record." *Rodriguez v. McGinnis, supra* at 86, dissenting opinion.

A number of useful approaches to handling civil rights actions filed by prisoners have been developed and adopted by the federal courts and suggested by commentators. The Judicial Commission on §1983 of the Federal Judicial Center, for example, has proposed several procedures which the District Courts may use in prisoner cases: (1) a centralized "writs desk" for prisoner petitions with an initial review and recommendation by a magistrate;[52] (2) the use of specific complaint forms designed to elicit sufficient information from a prisoner to determine the substantiality of the complaint; (3) dismissing *sua sponte* frivolous complaints where amendments would be futile; (4) the expanded use of magistrates; (5) a requirement that defendant prison officials file "special answers" which would require the officials to investigate and evaluate the prisoner's complaint in a report to the court. Remington, *State Prisoner Litigation and the Federal Courts*, Ariz. St. L. J. 549 (1974).[53]

[51] Petitioners indicate that the greatest number (36%) of complaints received from Maryland prisoners by the Inmate Grievance Commission are challenges to adjustment team decisions. The relief sought in virtually all of those cases includes restoration of good time taken away as a disciplinary measure. See, e.g., *Bundy v. Cannon*, 328 F. Supp. 165, 167, 175, 177 (D. Md. 1971). Under *Preiser v. Rodriguez, supra*, therefore, exhaustion of state remedies is already required in perhaps a third of the potential constitutional complaints by Maryland prisoners.

[52] See, in support, *Mathews v. Weber*, ____ U.S. ____, 44 L.W. 4065 (1/13/76).

[53] The Fifth Circuit has commented favorably upon the use of a "special report" to be filed by state prison officials to assist the district court in determining whether there is a factual basis for the allegations in *pro se* prisoner complaints. *Hardwick v. Ault*, 517 F.2d 295 (5th Cir. 1975). See also, *Watson v. Ault*, 525 F.2d 886, 892 n. 7 (5th Cir. 1976).

The Federal Rules of Civil Procedure provide for other methods which can be used to clarify the issues in a case and to separate cases which are frivolous or do not concern denials of federal constitutional rights from complaints which do raise issues of a constitutional dimension. Rule 16, for example, encourages pre-trial conferences.[54] In addition, the defendants may institute discovery proceedings, Rules 26-37, and they may, or be required by the court to, move for a more definite statement of the prisoner's allegations. Rule 12(e). These approaches were suggested in *Reed v. Jones*, 483 F.2d 77, 79 (5th Cir. 1973). The Federal Magistrates Act specifically authorizes a district court to assign U.S. Magistrates the duty of assisting a federal judge in the conduct of pretrial or discovery proceedings in a civil action. 28 U.S.C. §636(b)(2).[55]

The appointment of counsel for indigent persons is perhaps the most effective means of assuring that cases are properly and efficiently litigated, and the district courts may request attorneys to represent prisoners who have been permitted to proceed *in forma pauperis*. See, 28 U.S.C. §1915(d).[56] In addition, the courts can assign law students to investigate and evaluate prisoner claims under the "inherent power to . . . appoint persons unconnected with the court to aid judges in the performance of their judicial duties, as they may arise in the progress of a

[54] See also, Rule 35, Rules of the U.S. District Court for the District of Maryland. Respondents' Brief, Addendum B.

[55] This is one of the suggestions advanced by Mr. Chief Justice Burger to deal with prisoner petitions. Burger, *Report on the Federal Judicial Branch*, Delivered before the American Bar Association, Washington, D.C. August 6, 1973, at 10.

[56] Counsel may also be appointed in an *amicus* capacity. See, *Brown v. Allen*, 344 U.S. 433, 502 (1953), separate opinion of Mr. Justice Frankfurter.

cause." *In re Peterson*, 253 U.S. 300, 312 (1920). Other means of producing more information for the court about a cause of action, without appointing attorneys or law students in adversary or investigatory capacities, include the "amplification" procedure which is used in at least two circuits in 28 U.S.C. §2255 cases,[57] and the employment of a questionnaire, such as the form recommended by the Federal Judicial Center Committee, by which the court can develop the factual basis for a prisoner's complaint and determine whether a prisoner is abusing the judicial process by multiple filings. See, *Watson v. Ault, supra* at 892 n.6 and appendix.

It is also proper to consider what means are available to the various state prison systems which could be employed to assist the federal courts in managing prisoner cases. In *Younger v. Gilmore*, 404 U.S. 15 (1971), the Supreme Court established the importance of prison law libraries as a basic means of assisting prisoners in obtaining their constitutional right to access to the courts. A program in which prisoners are trained to work in the libraries as "jailhouse lawyers" is an effective means of providing legal assistance to other prisoners. See, Wexler, *The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects*. 7 Crim. L. Bull. 139-56 (1971); *Inmate Involvement in Prison Legal Services*, ABA Commission on Correctional Facilities and Services (1974). A system of prison law libraries, thoughtfully planned, organized and implemented, properly supervised and utilized, and staffed by prisoner paralegals, law students and perhaps attorneys, is not only an effective means for indigent and uneducated prisoners to obtain meaningful

[57] See, *United States v. Simpson*, 436 F.2d 162 (D.C. Cir. 1970); *Raines v. United States*, 423 F.2d 526, 529-30 (4th Cir. 1970).

access to the courts, but also would result in prisoners filing non-frivolous cases, in proper form, that could be efficiently managed by the federal courts. The provision of legal services for prisoners

> . . . would help eliminate frivolous claims or those which could be easily adjusted administratively. Further, petitions drawn with the assistance of counsel would be clearer and more to the point and would help assure that the relief sought falls within the framework of existing rights and remedies. Coulson, *Id.*[58]

Petitioners assert, without any evidence to support their claim, that "it is certainly a naive view of the realities of prison life" to expect that Maryland prisoners will voluntarily resort to the Inmate Grievance Commission unless they are compelled to do so under an exhaustion requirement. Petitioners' Brief, p. 75.[59] The problem lies not with the prisoners, however, but with

[58] See also, Lesnick, *Grievance Procedures in Federal Prisons*, 123 U. Pa. L. Rev. 1 (Nov. 1974), discussing the expanding use of law students and prisoner paralegals to provide legal assistance for prisoners; *Unites States v. Simpson*, *supra* at 167-170, encouraging the development of prisoner legal services programs staffed by law students.

[59] Petitioners position is contradictory in that they claim the Commission is such an adequate State remedy that an exhaustion rule should be imposed on Maryland prisoners, while admitting at the same time, that the Commission has been so ineffective that prisoners will not voluntarily petition it. The correct view is that

> "... it may well benefit prisoners to seek administrative relief first since this may be both a more expeditious and advantageous source of relief from unlawful action. Nevertheless, where a prisoner utilizes §1983 as the means to attack the conditions of his confinement, the very nature of the suit and the rules governing its procedure remove it from any judicial requirement of exhaustion. See *Preiser v. Rodriguez*, [*supra*]. (citation omitted). *Willis v. Ciccone*, *supra* at 1015 n. 3.

the Commission. A fundamental principle upon which all commentators in the field of prisoner grievance arbitration agree is that for a grievance mechanism to be perceived as fair and to gain acceptance by prisoners, it must provide for genuine prisoner input beyond the filing of a complaint or request for relief.[60] The Maryland grievance mechanism functions on the assumption that working with prisoners to resolve their problems constitutes giving them something they do not deserve, and that the proper approach is to relent only when a prisoner can prove in an adversary proceeding that he is entitled to relief. Respondents, therefore, must restate the obvious:

> . . . those who are allowed a voice in the decision-making process are more likely to obey such rules. . . . Inmate participation does not contemplate the removal of authority from prison administrators; it only provides a means by which the inmates can feel that, and it would actually be that, they are to some degree still responsible for their futures. S. Car. Department of Corrections. *The Emerging*

[60] See, Lesnick, *supra* at 37. See also, e.g., *Preventive Mediation in Corrections*, "Conflict" (quarterly publication of the Institute of Mediation and Conflict), 11/74; *Grievance Arbitration in Prison: Holton Experiment*, Resolution of Correctional Problems and Issues, Spring, 1975; National Council on Crime and Delinquency, *Peaceful Resolution of Prison Conflict*, 1973; Note, *Bargaining in Correctional Institutions: Restructuring the Relationship Between the Inmate and the Prison Community*, 81 Yale L.J. 726 (1972).

Rights of the Confined, 94 (1973). Also see, Corrections Magazine, Jan./Feb. 1975, passim.[60a]

To summarize, it is apparent that there are a variety of measures available to the federal courts and the state prison systems which will serve to resolve the difficulties the courts encounter in managing prisoner civil rights actions and which will permit the prison systems to correct their own errors without unnecessary federal court intervention. The interests of the states and the courts, therefore, can be fully served without imposing a rule of exhaustion on state prisoners in proper §1983 cases.

[60a]The recent proliferation of prisoner grievance mechanisms in the various state prison systems (See, Pet. for Cert. at 10 n. 3) has occurred despite the settled law which precludes an exhaustion requirement for prisoners in cases properly brought under §1983. See, "Prison Grievance Procedures: A National Survey of Programs Underway," *Corrections Magazine*, January/February, 1975. Grievance procedures, such as the Maryland Inmate Grievance Commission, have developed because state prison officials perceive the need for such mechanisms in the proper administration of their prison systems. Petitioners offer no empirical support for their claim that the decision below will in any way adversely affect the progress which is being made in this area. In fact, it would appear that the no-exhaustion rule in §1983 cases has a beneficial effect on the development of grievance procedures. The availability of federal court relief for prisoners is an incentive for the states to provide grievance procedures which act promptly and fairly. If a state grievance mechanism is visible and has simple, workable procedures, and if prisoners believe that they will have a fair opportunity to present their claims to an agency which will provide relief, where appropriate, in a reasonable period of time, many potential *pro se* litigants in federal court would avail themselves voluntarily of such a procedure rather than engage in difficult and protracted litigation.

F. This Court's Decision In *Gibson v. Berryhill*, 411 U.S. 564 (1973) Does Not Suggest An Exception To The No-Exhaustion Rule In §1983 Actions Which Is Applicable To This Case

The Supreme Court's decision in *Gibson v. Berryhill*, 411 U.S. 564 (1973), apparently leaves unresolved the question of whether the exhaustion of state administrative remedies may be required in a §1983 action where the state remedy was initiated and pending, and the individual would be deprived of nothing until completion of the state proceeding. See, *Brooks v. Center Township*, 485 F.2d 383, 386 (7th Cir. 1973). The Court of Appeals for the Fourth Circuit implicitly recognized the appropriateness of an exhaustion of state administrative remedies requirement, even in a §1983 action, under such limited circumstances in *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 n.2 (4th Cir. 1974), cert. denied 419 U.S. 836 (1974), but it rejected Petitiones' argument that *Gibson v. Berryhill* supports an exhaustion requirement in the present case. *McCray v. Burrell*, 516 F.2d 357, 364 (4th Cir. 1975).

The nature of the possible "*Gibson v. Berryhill* exception" to the general rule that claims under §1983 are not subject to an exhaustion of state administrative remedies rule has been described in various terms. In *Toney v. Reagan*, 467 F.2d 953, 956 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973), for example, while recognizing the principle established by *Monroe v. Pape*, *McNeese v. Board of Education*, *Damico v. California*, *Houghton v. Shafer* and *Wilwording v. Swenson*, the Court held that "*prospective*, as distinguished from *retrospective*, state administrative remedies must be exhausted in order to

state a claim upon which relief can be granted under the Civil Rights Acts." (emphasis added).

The plaintiffs, who were nontenured professors at Fresno State College in California, were notified in November, 1970, that they would not be reemployed in the fall of 1971, and at that time, "the alleged injury to their constitutional rights was not yet consummated." *Id.* The court found that

> [t]he grievance procedures in this case would not operate to rectify a wrong which had already occurred. Rather, they were a means of forestalling a threatened deprivation of rights which was not to transpire for several months. In the event that appellants were to utilize the state hearing procedures, they might successfully reverse the decision not to reemploy them, have their contracts renewed, and suffer no break in their employment. *Id.*

The rationale for an exhaustion requirement under such circumstances can also be defined in terms of "ripeness" and "finality" of agency action. As Professor LaFrance has indicated, courts will determine whether an agency action is ripe for adjudication by looking "to the nature of the action challenged, and more particularly to the impact on the parties." LaFrance, *Federal Litigation For the Poor*, Law and Social Order, Arizona St. Univ. L.J. 33 (1972).

> The concept of finality, then, does not require that the administrative process have run its entire course, but only that there exists an agency event which affects asserted interests in a definable way. Delay itself may be a reviewable 'action', even though an administrator is still weighing policy factors preliminary to a result. Particularly is this true of a request for interim relief. [citations and footnotes omitted] *Id.* Also see *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (U.S. App. D.C. 1970).

The Court of Appeals for the Fifth Circuit would require the exhaustion of adequate state administrative remedies only to the extent necessary to assure that a Civil Rights Act claim is "ripe for adjudication," *Polk v. State Bar of Texas*, 480 F.2d 998, 1003 (5th Cir. 1973), or "final from the institutional viewpoint." *Stevenson v. Board of Education of Wheeler County, Georgia*, 426 F.2d 1154, 1157 (5th Cir. 1970), cert. denied, 400 U.S. 957, 91 S.Ct. 355 (1970). Similarly, in *Raper v. Lucey*, 488 F.2d 748, 751 n.3 (1st Cir. 1973), a civil rights action brought by an applicant for a Massachusetts motor vehicle license alleging that the state handling of license applications violates the Due Process Clause, the Court acknowledged and accepted the principle that the requirement of exhaustion of available and adequate state administrative remedies is unnecessary in §1983 cases, "[b]ut we adhere to our view of the necessity for ripeness to the extent that there must be at least some definitive administrative or institutional determination before a §1983 action may arise."[61]

The court below correctly concluded that the language in *Gibson v. Berryhill, supra* at 574-75, relied on by Petitioners (Pet. Br. at 65), does not suggest that exhaustion may be required of Respondents.

> At most, the statement is a mere introduction to an alternative ground of decision; but, more importantly, it relates to facts quite dissimilar from those in the instant cases. *Gibson* proceeds on the premise that "the individual charged is to be deprived of nothing until the completion of [the state adminis-

[61] Petitioner's reliance on *U.A.W. v. State Farm Mutual Automobile Insurance Company*, 350 F. Supp. 522 (N.D. Ill. 1972), is misplaced. The decision in *U.A.W. v. State Farm* relied primarily on *Metcalf v. Swank*, 444 F.2d 1353 (7th Cir. 1971), which was subsequently reversed by the Supreme Court in light of *Carter v. Stanton*, 405 U.S. 669 (1972). See, 406 U.S. 914 (1972).

> trative] proceeding"—in short, in *Gibson* the possible harm was *in futuro*. *Gibson*, therefore, is unlike the instant cases where the alleged deprivation of civil right has occurred and may be continuing. . . . The rationale of this distinction—which we need not adopt or reject to decide the cases before us—is that exhaustion may be necessary only when it assures that a decision of state officials depriving plaintiff of a civil right is final, so that the case is ripe for adjudication. (citation omitted; brackets in original).[62]

The rationale of *Gibson v. Berryhill* does not permit a requirement that a Maryland state prisoner seek relief from the Inmate Grievance Commission before being allowed to bring his constitutional claims to federal court. The Commission is a "retrospective" rather than a "prospective" administrative remedy.[63] It is a forum in which a prisoner who has been injured or deprived of something by prison officials may air his or her grievance. The Commission is not an administrative body which decides if a person will be subjected to some loss or injury but rather, its function is to decide whether a

[62] *Cf., Blanton v. State University of New York*, 489 F.2d 377, 383 (2nd Cir. 1973).

[63] Petitioners concede this (Pet. Br. at 65) but claim without explanation, that the Commission has the "capability" to be a prospective remedy. Respondents perceive no way in which the Commission is, or has the capability under the present Maryland statute (Article 41 §204F) and practice to be, a prospective remedy. The State's position here, as throughout its other arguments, appears to be that the Commission is an adequate remedy, and therefore, it must be exhausted. This is a "bootstrap" argument, of course, and overlooks the fact that a rule of exhaustion, if any, is "rooted in considerations of federal-state comity," *Preiser v. Rodriguez*, *supra* at 491, and not on whether a particular state remedy is adequate or available.

person who has already been injured or caused to suffer some deprivation is entitled to relief.[64]

The present cases do not concern injuries which Respondents expect to suffer in the future. Respondents' complaints are based on the past acts of Maryland prison officials for which the Inmate Grievance Commission cannot provide a remedy. McCray was twice placed into isolated confinement. Washington suffered injuries from being refused medical treatment. Stokes suffered violations of his First and Fourteenth Amendment rights when he was arbitrarily prohibited from receiving and reading specific political publications. Petitioners' desire for an exhaustion requirement to resolve future disputes is therefore inopposite. As this Court stated in the context of a desegregation case:

> The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now, and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963).

Also see, *Pacific Telephone & Telegraph Co. v. Kuzkendahl*, 265 U.S. 196 (1924); *Oklahoma Gas Co. v. Russell*, 261 U.S. 290 (1923); Jaffe, *Judicial Control of Administrative Action*, 429 (1965).

[64] In fact, the Inmate Grievance Commission statute requires that a grievance be ripe for adjudication and be based upon the final decision of a prison official prior to adjudication by the Commission. Article 41, §204F(d). See also, Regulations of the Inmate Grievance Commission, #12.07.01.

G. The Rule That Exhaustion Of Federal Administrative Remedies May Be Required In Actions Brought Against Federal Defendants Does Not Suggest That Exhaustion Of State Administrative Remedies May Be Required In An Action Brought Under 42 U.S.C. §1983 Nor Is The Doctrine Of Abstention Applicable To This Case.

Petitioners rely upon cases requiring the exhaustion of federal administrative remedies to support their claim that Respondents must exhaust a state administrative remedy. (Pet. Br. at 66-69). The cases cited by Petitioners were actions brought by U.S. military personnel and federal prisoners who alleged that their rights had been violated by officials, employees or agencies of the government. The underlying reasons for an exhaustion requirement where a cause of action is against a federal defendant, and the relevant federal statute or regulation prescribes an administrative remedy,[65] are not applicable to the present case. In the military context, for example, the rationale for the exhaustion rule "lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed." *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971). See also, *Kochie v. Norton*, 343 F. Supp. 956, 960-61 (D. Conn. 1972).

By comparison, in discussing 42 U.S.C. §1981, this Court was held that the supplementary nature of federal court jurisdiction under that statute makes it imperative for a claimant to file his court action, without waiting for an administrative resolution of his claim, in order to avoid being barred by the statute of limitations.

[65] See, e.g., *McGaw v. Farrow*, 472 F.2d 952, 957-58 n. 17 (4th Cir. 1973).

Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of Congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a §1981 action while an E.E.O.C. claim is pending .... But the fundamental answer to petitioner's argument lies in the fact—presumably a happy one for the civil rights claimant—that Congress has clearly retained §1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. *Johnson v. Railway Express*, 421 U.S. 454, 461 and 465 (1975).

This Court's decisions in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) and *Schlesinger v. Councilman*, 420 U.S. 738 (1975), do not support Petitioners' argument that an exhaustion rule should be imposed in the present case. *Huffman* and *Schlesinger* considered the extent to which the federal courts should exercise, or should refrain from exercising, their equity powers to intervene in an ongoing, state civil proceeding and a pending military court-martial, respectively. The Court held in both cases that the federal courts should not have interfered. The decisions were principally based on the rationale behind the abstention doctrine expressed in *Younger v. Harris*, 401 U.S. 37 (1971),[66] and they do not undermine the no-exhaustion rule of *Monroe v. Pape, supra*. See, *Huffman v. Pursue, Ltd., supra* at 609 n.21.

[66] See, e.g., *Schlesinger v. Councilman, supra* at 761, Mr. Chief Justice Burger, concurring in the judgment.

Traditionally, the principles of abstention have been applied to prohibit federal injunctions against pending state judicial proceedings, *Younger v. Harris, supra; Huffman v. Pursue, Ltd., supra*; or in situations where there existed complex regulatory questions to be resolved through the application of administrative expertise, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); a mixed issue of federal and state law, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); or an "uncertain issue of state law," the resolution of which may eliminate or materially alter the federal constitutional question. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). None of these considerations apply to the present case, and abstention would therefore be inappropriate. See, *Procunier v. Martinez, supra* at 400-04; *Rodriguez v. McGinnis, supra* at 80-81, Chief Judge Friendly, concurring.

H. This Court Should Not Assume The Role Of Congress By Imposing An Exhaustion Rule In Prisoner §1983 Cases.

This Court has recognized its own limitations in establishing the powers and duties of the federal judiciary and has consistently held that decisions concerning matters of fundamental policy are for Congress, not the Court, to make. See, *e.g., Flood v. Kuhn*, 407 U.S. 258 (1972).[67] Congress has responded with new laws when it deemed such legislation was necessary. For example, in light of

[67] In *Rubin v. Weinberger*, 524 F.2d 497 (7th Cir. 1975), the court found that Congress expressly sought to avoid overburdening the courts when it limited review of Social Security Administration actions.

Fay v. Noia, 372 U.S. 391 (1963), Congress rewrote 28 U.S.C. §§2254 and 2255 to provide guidance to the federal courts in habeas corpus proceedings. Similarly, Congress has legislated exhaustion of remedies requirements in other areas; *e.g.*, the collection of state taxes (28 U.S.C. §1341) and state utility rate orders (28 U.S.C. §1342). See also, *Love v. Pullman Company*, 404 U.S. 522 (1972). On the other hand, Congress has not enacted an exhaustion requirement for 42 U.S.C. §1983. Its inaction is consistent with the Supreme Court's holding in *Monroe v. Pape, supra*, that Congress did not intend there to be an exhaustion requirement in such cases.[68]

If there is a need to re-examine the role of the federal courts in some kinds of constitutional cases, that task should be undertaken by Congress and not by the judiciary. In its enactment of §1983, Congress refused to limit the remedy to only certain classes of plaintiffs, rejected the notion that there may be exhaustion if the state remedy is adequate and decided not to use the federal district courts as appellate bodies to review state decisions. It is beyond the province of this Court to

[68] It is presumed that Congress is aware of this Court's decisions and the many decisions of the lower federal courts following the rule that exhaustion of state administrative remedies may not be required in §1983 cases. See, *Shapiro v. United States*, 335 U.S. 1, 16 (1948). The failure of Congress to amend the federal code to provide for an exhaustion requirement indicates congressional approval of the no-exhaustion rule. *Cf., United States v. Powell*, 379 U.S. 48, 55 n. 13 (1964).

amend the Civil Rights Act of 1871 by attaching an exhaustion requirement.[69]

I. The Maryland Inmate Grievance Commission Is Not An Adequate State Administrative Remedy.

The Supreme Court has recognized that even in cases where it may be appropriate for a federal court to require a plaintiff to exhaust administrative remedies, such exhaustion is unnecessary where the administrative remedy is inadequate. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973), and the cases cited there.

> State administrative remedies have been deemed inadequate by federal courts, and hence not subject to the exhaustion requirement, on a variety of grounds. Most often this has been because of delay by the agency (citation omitted), or because of some doubt as to whether the agency was empowered to grant effective relief (citations omitted). State administrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it (citation omitted). *Id.*

[69] In *Preiser v. Rodriguez, supra*, the Supreme Court gave deference to congressional intent, 411 U.S. at 489-90 and 492 n. 10, and declined the invitation to "graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Klan Act." *Id.* at 503, Mr. Justice Brennan, dissenting. Even Judge Aldisert, in his powerful attack on the continuing validity of the assumptions which motivated the passage of §1983, concludes that congressional action is necessary to effect the reforms for which he is arguing. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Order 557, 574-577. See also, *Rodriguez v. McGinnis, supra* at 83, Judge Feinburg, concurring ("the correct way . . . is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate."). *Id.* at 84, Judge Oakes, concurring.

1. The Inmate Grievance Commission is not an independent and autonomous adjudicatory agency which can be depended upon to provide a Maryland prisoner with a fair opportunity to obtain relief.

The Inmate Grievance Commission is within the executive branch of the Maryland state government; specifically, it is a component of the Department of Public Safety and Correctional Services. The Secretary of the Department is ultimately responsible for the operation and administration of the Commission, including final approval of the rules, regulations, policies and practices of the Commission. The Secretary shares the same relationship with the Maryland Division of Correction and the Patuxent Institution, both of which are also within the Department of Public Safety and Correctional Services. (App. 355).

The Secretary is not a member of the Inmate Grievance Commission. His only functions with regard to the Commission, in addition to his ultimate responsibility for its operation, are to review the opinions of the Commission and to confer with the Executive Director concerning administrative matters (App. 355-57). Whenever the Commission makes a favorable ruling on a prisoner's grievance, its disposition is in the form of a "recommendation" to the Secretary who then may affirm, reverse or modify the recommendation. Article 41, §204F(f)(2), Annotated Code of Maryland. The action of the Secretary is the final decision on the grievance.

The office of the Attorney General of Maryland provides legal counsel to the Secretary, the Inmate Grievance Commission, the Division of Correction and the Patuxent Institution. The Commission refers legal questions to the Attorney General, and his opinion would

affect the disposition of the grievance under consideration. Similarly, the Secretary seeks advice from the Attorney General when he reviews the recommendations of the Commission (App. 313-15).

The involvement of the office of the Attorney General in the operation of the Inmate Grievance Commission may be summarized by the following hypothetical situation (T. 69-70):[70] A Division of Correction or Patuxent Institution employee against whom a grievance is filed, may be presented at a hearing before the Commission by an Assistant Attorney General. During deliberation by the Commission, if a legal question were involved, an Assistant Attorney General would be asked for advice. If the grievance were found to be meritorious, and a review by the Secretary therefore required, the Secretary also could call upon an Assistant Attorney General for an opinion. If the prisoner appealed the final decision of the Commission or the Secretary, the respondent would be represented in court by an Assistant Attorney General. If the complainant prevailed in his appeal, the office of the Attorney General would be called upon by the Division of Correction or Patuxent Institution to assist in the implementation of the appropriate relief. The potential conflicts of interests engendered by the representation by the Attorney General's office of the Secretary, the Commission and the agencies which appear before the Commission as parties against whom grievances have been filed, is substantial and to the detriment of any complaining prisoner.

In a situation raising similar conflict of interest problems, where one Assistant Attorney General represented the petitioner before a state commission and another

[70] Reference is to the transcript of hearings before the District Court in *McCray v. Burrell, supra*, on June 11 and 12, 1973.

Assistant represented the commission at a later hearing, a Connecticut court applied the Code of Professional Responsibility and found the action unprofessional and unsupportable. *Quist v. Connecticut Commission on Human Rights*, Connec. Court of Common Pleas, 11/10/75, 44 L.W. 2249 (12/9/75). Further, this Court was held that in situations less obvious than in *Quist* or the Maryland Grievance Commission procedure, the mere appearance of biased conduct must be avoided. As Mr. Justice White stated:

> There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disasterous extent. *United States Civil Service Comm. v. Natl. Assoc. of Letter Carriers*, 413 U.S. 554, 565 (1973).

The rights of a prisoner in an Inmate Grievance Commission proceeding are most seriously disregarded when a recommendation of the Commission is reviewed by the Secretary of the Department of Public Safety and Correctional Services. Under Article 41, §204F(f)(2), every decision of the Inmate Grievance Commission in which a prisoner's complaint is found to be wholly or partially meritorious must be reviewed by the Secretary. It is the normal procedure for the Secretary, upon receipt of such a decision, to solicit and receive facts and opinions from the Commissioner of the Maryland Division of Correction and the Director of the Patuxent Institution concerning the matter at issue and for the Secretary to make use of those facts and opinions in his decision to affirm, reverse or modify the recommendations of the Commission.

The following excerpts are from a deposition taken of the Secretary on February 28, 1974, by counsel for Washington:

> Q [by Mr. Morgan]: Is it your practice, Secretary Lally, before issuing what would be the final order in the case, your order, have you ever issued a proposed order to both parties, either/or both parties, for their comment and then issue your final order?
>
> A [by Secretary Lally]: I have never issued a proposed order. I draft my order and send it to the Division of Corrections, as a matter of policy, or it could be Patuxent, for that matter, because those are the only two agencies that are involved under the Inmate Grievance Commission Act. As a matter of policy, I send it to the head of the Division of Corrections or Patuxent, giving them a two or three day period to respond to it, before I issue the final order. (App. 364).
>
> * * * * * *
>
> Q What happens, Secretary Lally, if a comment comes back from the Division of Correction or Patuxent after the three-day period taking some objection to your ruling, which by that time has become final? What is your practice then?
>
> A I would weigh whatever they had to say and take it into account when I drafted the final order. (App. 365).
>
> * * * * * *
>
> Q . . . What is the purpose of that three-day period, Secretary Lally?
>
> A I don't pretend to know all of the problems of the institution and I have often found in the findings of fact that the person representing the institution is not always knowledgeable of the total problems of the institution, and I don't have sufficient facts to make a final decision on it.

> Q And so that three-day period is for what?
>
> A Looking for sufficient facts upon which I could make an intelligent decision on the order. (App. 366-67).
>
> * * * * * *
>
> Q And, when the order is received, the proposed draft order is received by Dr. Boslow or Mr. Jordan, it's their understanding, I assume, that they have three days in which to make some kind of statement to you if they have a statement to make?
>
> A Yes. In fact, they are explicitly told in the letter that the inmate will not be given a copy of the order until three days hence.
>
> Q And their understanding and your understanding of that three-day period, as I take it, is that that is a three-day period in which they have an opportunity to respond to you about the order?
>
> A That's correct. (App. 373).

The solicitation of additional evidence from prison officials by the Secretary after he receives a decision from the Grievance Commission is completely *ex parte*. Neither the inmate or his counsel, if he has counsel, is made aware of its occurrence or given an opportunity to respond (App. 372). The Secretary relies on the evidence he receives to review Commission decisions, and his final action based on that evidence may be to reverse or substantially modify a decision which was originally favorable to the inmate.[71]

[71] For example, in I.G.C. No. 1295, *Curtis E. Midgett, et al.*, the Secretary reversed a Grievance Commission decision which was highly favorable to the inmates based on information he received after the hearing from the Commissioner of the Division of Correction. The inmates were never told of the *ex parte* communications between the Secretary and the Commissioner and never given an opportunity to respond. The transaction is fully described in the Appendix at 264-74 and 367-72. There have also been other cases where the Secretary has utilized facts obtained after a hearing, without the inmate's knowledge, to modify a favorable Commission decision (App. 373).

The Secretary's policy and practice of giving prison officials the opportunity to confidentially object to Grievance Commission decisions and submit additional evidence after the Commission has made findings of facts and reached a conclusion based on those facts, renders the hearing procedure meaningless and deprives the affected inmate of his right to a fair hearing. The Court of Appeals of Maryland has held in another context that it is well-established and settled law in Maryland that administrative agencies " 'must observe the basic rules of fairness as to parties appearing before them.' (citation omitted)." *Rogers v. Radio Shack*, 271 Md. 126, 129 (1974). An agency may not rely upon a written report without providing the parties with an opportunity for cross-examination or rebuttal. *Id.* See also, *Dal Maso v. Bd. of County Commissioners*, 238 Md. 333, 337 (1964). In *Temmink v. Bd. of Zoning Appeals*, 205 Md. 489, 497 (1954), where the agency relied upon data which the parties had no opportunity to challenge, the Court of Appeals held that "the personal knowledge of the members of the Board or of some other officials upon whom they rely cannot be considered as evidence. . . ."

"One of the basic requirements of fair procedure is that an agency's decision should be based upon the evidence produced at the hearing before the agency." Cohen, *Some Aspects of Maryland Administrative Law*, 24 Md.L.Rev. 1, 15 (1964). For an agency to base its decision on evidence outside of the record is unconstitutional as a denial of due process of law. See, *United States & I.C.C. v. Abilene & Southern Railway Co.*, 265 U.S. 274, 289 (1924); Cohen, *supra* at 16-18.

The statutory delegation of power to the Secretary to affirm, reverse or modify the recommendations of the Commission is arguably unconstitutional. Under Article

41, §204F(f)(2), the Secretary may exercise his power "where he disagrees with the findings and conclusions of the Commission." There is no other standard to guide his discretion, and although the issue has not been decided by the Maryland state courts, similar delegations of authority have been found constitutionally insufficient. See, *County Commissioners v. Northwest Cemetery Co.*, 160 Md. 653 (1931); *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377 (1942). The Secretary has testified that the range of possible actions he could take in reviewing a Grievance Commission decision "could be as broad as your imagination" (App. 360). The Executive Director of the Commission has described the statutory delegation of power to the Secretary as "a shotgun legislative phrase" permitting him to take "whatever action he deems appropriate" (T.59).

When the Commission submits its recommendations to the Secretary for his review, the Secretary receives only the written decision of the Commission. He does not review the tape of the hearing, the evidence presented at the hearing, the papers submitted by the parties or any contents of the Commission file (App. 318, 361).

The Secretary has not formulated any written standards to guide his discretion in reviewing the recommendations of the Commission (App. 363). The Inmate Grievance Commission statute not only lacks standards for review but also fails to provide sufficient procedural safeguards against unreasonable, arbitrary or capricious exercise of the delegated powers. See, *Truitt v. Board of Public Works*, 243 Md. 375 (1966).

Judicial review is provided for by Article 41, §204F(1), but it is "limited to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or Constitutional

requirements." There is no right of appeal beyond the Circuit Court to the Court of Appeals or Court of Special Appeals. See, *Urbana Civic Association v. Urbana Mobile Village*, 260 Md. 458 (1971). Furthermore, the reviewing court is "limited to a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings." Independent, *de novo* review of the record is therefore precluded.

When an inmate receives a final adverse decision in his case, he is not informed by the Commission of his right to appeal, and he is not advised of the procedure to file an appeal (T.49-50). Appellant McCray testified that he had not filed such an appeal because he was unaware of the proper papers and the proper court in which to file.

The Commission or Secretary has found the complaints of prisoners to be without merit in more than 300 cases, yet as of February 27, 1974, only 24 of those adverse decisions had been appealed. The results on appear were 5 affirmances, 4 reversals, 5 remands for new hearings, and 10 appeals pending (App. 323-25). It is the policy and practice of the Circuit Courts of Maryland to not appoint counsel for indigent prisoners in Inmate Grievance Commission appeals (T.67-68).

2. The fact-finding process of the Maryland Inmate Grievance Commission does not afford a full and fair hearing on the constitutional claims of prisoners.

The inadequacy of the Inmate Grievance Commission as an effective administrative remedy is apparent when one compares the paucity of procedural safeguards which are afforded a prisoner before the Commission with the full panoply of due process guarantees to which all other

classes of litigants are entitled in virtually every other Maryland administrative agency proceeding. See, the Maryland Administrative Procedure Act, Article 41, §§244 *et seq.*, Annotated Code of Maryland, the pertinent parts of which are reproduced in the Addendum to the Respondents' brief.

1. The screening of prisoner complaints.

Article 41, §204F(e) permits the Inmate Grievance Commission to conduct a preliminary review of each complaint submitted to the Commission. "If upon such preliminary review the grievance or complaint is determined to be on its face wholly lacking in merit, it may be dismissed . . . without a hearing or without specific findings of fact." *Id.* These dismissals without hearings are ordered by the Executive Director of the Commission at his discretion without further review by any members of the Commission (App. 294-95). The following statistics, cumulative as of the dates indicated, are relevant (App. 339-44):

	5/31/73	8/31/73	11/30/73	1/31/74
Complaints received (since 7/1/71)	923	1119	1274	1385
Administrative dismissals	507	590	700	752
Hearings held (since 11/1/71)	318	376	491	533
Dispositions				
Meritorious in whole or part	103	113	136	152
Not meritorious	152	205	256	296
Moot	10	13	16	18
Pending disposition	50	42	79	67

A summary of the grievances dismissed administratively by the Executive Director, without hearings, be-

tween December 1, 1973 and February 28, 1974, a representative and typical 90-day period of operation for the Commission (App. 294), is as follows (App. 285-94; Deposition of Dene L. Lusby, February 28, 1974, pages 12-75):

1. Complaints dismissed (45)[72]
   a. Totally lacking in merit (7)
   b. Lacking in specificity (1)
   c. No controversy (4)
   d. Moot (6)
   e. Lack of subject matter jurisdiction (14)
   f. Lack of jurisdiction over the person (1)
   g. Abstention in favor of a court (6)
   h. Lack of prosecution (4)
   i. No possible relief could be granted (2)
2. Informal resolutions to the satisfaction of the inmate (4)
3. Explanation of sentence computation (3)
4. Provision of information to a relative (1)
5. Withdrawn by inmate (10)
6. Total (63)

These statistics indicate at least three serious deficiencies in the Commission's proceedings. First, there is no

[72] In at least one of these cases, an inmate complained that his constitutional rights had been or were being violated by prison officials, but his complaint was dismissed without a hearing. Leo J. Rites, a prisoner at Patuxent Institution, alleged that (1) he was being denied due process by not being permitted to have his counsel present at a disciplinary hearing, (2) his First Amendment rights were being violated by prison mail censorship regulations, (3) he was placed in "solitary confinement" under cruel and unusual conditions and for a disproportionate period of time and (4) he was being denied proper medical care, entrance into rehabilitative programs and decent living conditions. See Appendix at 287-94, 330-32 and 345-52.

requirement by statute, regulation or common practice that a prisoner who files a grievance will be afforded a hearing before the Commission. In fact, 752, or 54%, of the total of 1385 complaints received by the Commission have been dismissed without a hearing (App. 339). By comparison, the Maryland Administrative Procedure Act provides that "[i]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice." Article 41, §251.

Second, although the Inmate Grievance Commission statute provides for the preliminary review of grievances, it only authorizes the Commission to dismiss a grievance without a hearing if it is determined "to be on its face wholly lacking in merit." Article 41, §204F(e). The statute does not permit the investigation of grievances to determine if they warrant a hearing nor does the statute provide for the informal disposition of grievances. The Executive Director, however, regularly engages in the investigation of grievances as part of the preliminary review procedure, and he enters into negotiations with prison officials without the knowledge or consent of the complaining party (App. 284-85, 302-10; T.56). Compare, the Maryland A.P.A., Article 41, §251 which provides that "[i]nformal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default."

Third, it is apparent that a very small number of prisoners who petition the Commission are found to have wholly or partially meritorious claims. Of 1385 complaints received, the Commission has recommended some relief in only 152 cases (11%). The substantial likelihood of obtaining an adverse decision from the Commission renders it of questionable viability as an effective remedy for purposes of exhaustion. See, *City Bank Farmers'*

Trust Co. v. Schnader, 291 U.S. 24 (1934); *Jeffers v. Whitley*, 309 F.2d 621, 627-28 (4th Cir. 1962).

2. Hearings before the Inmate Grievance Commission.

Assuming a prisoner's grievance were to survive the preliminary screening process, it would be set for a hearing before the Commission. The scheduling of hearings is based upon two factors. First, cases are heard in the order in which they are received by the Commission. Second, a day of hearings is scheduled at each prison when the Commission accumulates enough cases from a prison to fill a day of hearings (App. 296).

The Commission will occasionally assign priority to a case and have it set for a hearing before other grievances which may have been received earlier (App. 296-97). There are no exceptions to the policy of accumulating a sufficient number of cases from each prison to fill a day of hearings before visiting a prison (App. 297). The Commission does, however, assume the authority to issue "interim orders" (App. 297).

An "interim order" is an order issued without a hearing (App. 297). Since its inception, the Commission has issued one interim order. (App. 297-302). In I.G.C. No. 1383, *James Bradley, et al.*, the Commission received the complaint on July 11, 1972, and issued an order that day without a hearing. A hearing was subsequently held on August 7, 1972, and a final decision was made on September 22, 1972 (App. 300-01).[73]

[73] In one other case the Commission issued an order before making a final decision. In I.G.C. No. 1521, *Joseph Wallace*, the Commission received a grievance on September 25, 1972, and a hearing was held on November 29, 1972. On December 4, 1972, the Commission recommended that the prisoner be transferred to a hospital. On December 13, 1972, the hearing was concluded, and a final decision was issued on April 26, 1973 (App. 301-02).

The Inmate Grievance Commission is authorized by Article 41, §204F(g) to investigate prisoner complaints and to gather the information necessary to review them. The Executive Director conducts the investigations, and prior to each hearing, he prepares a file which contains the complaint, his reports and memoranda, and the letters, documents and other materials he has gathered (App. 302-08). The investigation typically involves interviewing prison officials and obtaining letters, statements and prison records about the subject matter and persons involved in the grievance. *Id.* It is extremely rare that a prisoner is contacted during the investigation except to request from him a list of the witnesses he desires to have present at the hearing (App. 304). In addition, the prisoner is not informed that an investigation has taken place, nor is he informed of the content of the file that is before the Commission during his hearing (T.52-53, 56-57). He therefore does not have an opportunity to rebut or otherwise challenge the *ex parte* information upon which the Commission may rely in making a decision.

Administrative agencies in Maryland are generally authorized to gather relevant information, to take notice of judicially cognizable facts and to utilize their own specialized knowledge, A.P.A., Article 41, §252(b) and (d); however, an agency must offer and make a part of the record all evidence it has gathered and upon which it will rely in the determination of the case, and it must provide the parties with notice and an opportunity to contest any facts judicially noticed or within the special expertise of the agency. *Id.*

By comparison, the Inmate Grievance Commission statute places virtually no restrictions upon the ability of the Commission to investigate a complaint, to gather

information or to consider all kinds of evidence without ever informing the prisoner or providing him with an opportunity to contest those facts.[74] The unfairness to the prisoner of this procedure is exacerbated because the party against whom a complaint is made is not required or requested by the Commission to file or to serve upon the prisoner a responsive pleading prior to the hearing (T.57). In addition, there is no provision in the statute or regulations of the Commission for pre-hearing discovery by the prisoner (App. 309; T.63).

An inmate is permitted to be represented by counsel at a Grievance Commission hearing, but counsel is not appointed for an indigent inmate who may request representation (App. 335). During the 90-day period from November 19, 1973 to February 20, 1974, the Commission issued recommendations in 127 cases. The prisoner was represented by counsel at 15 hearings, by a law student at 12 hearings, and by another prisoner at 34 hearings. The prisoner represented himself at 66 hearings (App. 275-82). There have been occasions when the party against whom a complaint was made was represented by an Assistant Attorney General, and the inmate who filed the grievance was unrepresented by counsel (T.65-66).

The Maryland Administrative Procedure Act provides that in contested cases, "[e]very party shall have the right of cross-examination of the witnesses who testify, and shall have the right to submit rebuttal evidence." Article 41, §252(c). The standards by which State agencies are governed in determining the admission and

[74] In addition to the evidence which is gathered *ex parte* by the Commission during the investigation stage before a hearing, on at least a dozen occasions, the Commission has solicited and received additional evidence after the hearing has been held (App. 317-18).

effect of evidence are established by the A.P.A. in §252(a).

A prisoner does not have the right to confront or cross-examine adverse witnesses at his Grievance Commission hearing. "The inmate shall have a reasonable opportunity to question any witnesses who testify before the Commission." Article 41, §204F(h). There is no provision for cross-examination of witnesses in the Commission regulations (T.74-75). In addition, a prisoner's witnesses may not be required to attend a hearing if they are not "available at reasonable times." Inmate Grievance Commission Rule 12.07.04(2). The Commission has the power to issue subpoenas, §204F(g), but it has never exercised that power (T.23-24, 63, and 97). On at least one occasion, a correctional officer appeared before the Commission and refused to testify. His testimony was not compelled by the Commission (T.98-101). On other occasions, inmates have been denied the witnesses of their choice on the ground that institutional records alone will be used as evidence at the hearing (App. 286-87; T.64-65).

The Commission has the discretion to limit the testimony that an inmate may elicit by restricting the number of witnesses he may call. Article 41, §204F(h). There are no written standards by statute or regulations which guide the discretion of the Inmate Grievance Commission in its decisions concerning the witnesses that may be allowed to testify at a hearing or the nature of permissible testimony. Witnesses do not testify under oath or affirmation at Commission hearings (T.15).

In every case where the Commission finds the grievance of an inmate to be wholly or partially meritorious, it may recommend to the Secretary of the Department of Public Safety and Correctional Services that the inmate

be afforded relief. Article 41, §204F(f)(2). Any decision which is favorable to an inmate is not final without the approval of the Secretary. *Id.* The Secretary, however, is not present at Commission hearings (T.61-62) nor does he receive the full record of cases for his review (App. 318, 361). Under the Inmate Grievance Commission statute, and in practice, the Secretary may reverse or modify a recommendation of the Commission making the final decision adverse to a prisoner. Article 41, §204F(f)(2). There are no procedural safeguards, however, to protect a prisoner from arbitrary action or reliance upon misinformation by the Secretary. Compare, Maryland A.P.A., Article 41, §253.

The lower court stated that the availability of judicial review protects a prisoner from arbitrary action by the Commission and the Secretary. For example, "[a]ny unreasonable refusal to allow an inmate to call a witness is reviewable in state court," 375 F. Supp. at 1301; and

opportunity to have records and documents present at a hearing] is reviewable in state court." *Id.*; and "[a]ny future disposition of the Secretary to act in an arbitrary manner is inhibited by the review available in state court." *Id.*

For purposes of determining the adequacy of an administrative remedy, however, it is not relevant that judicial review in the state court is available. The exhaustion of state judicial remedies is clearly not a requirement in §1983 cases. *Monroe v. Pape*, 365 U.S. 167, 183 (1961). And in cases where exhaustion of a state administrative remedy is a prerequisite to proceeding in federal court, judicial review of the state agency decision in the state court system is not a part of the exhaustion requirement. *Huffman v. Pursue*, 420 U.S. 592 at n.21

(1975); *Gibson v. Berryhill*, 411 U.S. 564, n.11 (1973); *Polk v. State Bar of Texas*, 480 F.2d 998, 1003, n.13 (5th Cir. 1973); *Palmigiano v. Mullen*, 491 F.2d 978 (1st Cir. 1974); *Wishart v. McDonald*, 367 F. Supp. 530 (D. Mass. 1973). The availability of an appeal to a state court from a decision of the Grievance Commission, therefore, affords no protections for a §1983 litigant whose claim is relegated to the Commission for purposes of exhaustion because such an appeal need not be pursued to complete the exhaustion requirement.

In proceedings before the Inmate Grievance Commission, under Article 41, §204F, the regulations of the Commission, and its common practice, there is little guarantee that a prisoner will receive a full and fair hearing on his claim or that a meaningful record will be developed. The procedures of the Commission do not present Maryland prisoners with a "fair opportunity to be heard" nor a "realistic expectation that resort to the proceedings" will afford relief from alleged deprivations of their constitutional rights. See, *Toney v. Reagan*, 467 F.2d 953, 958 (9th Cir. 1972), cert. denied, 409 U.S. 1130 (1973). Appellants do not suggest that Maryland must provide "the perfect grievance procedure," *Id.* at 960, but the Inmate Grievance Commission falls far below the minimum standards which a state administrative remedy would be required to meet for purposes of

exhaustion in an action brought under the Civil Rights Act.[75]

The Commission's complete disregard for the most fundamental notions of due process is nowhere so vividly described as in one member's dissent to a Commission finding. See, Resp. Br., Addendum D. In *In the Matter of: William Bryant*, I.G.C. No. 3599, Commissioner James V. Bennett noted at the beginning of his dissenting opinion that he was erroneously listed as concurring in the result.

> This was apparently due, in part, to the fact there was, as usual, no discussion of the case among the members prior to the drafting of the order and also to the general confusion, din, and noise surrounding the proceedings.

Mr. Bennett's dissent is unfortunately reminiscent of Professor Davis' excoriating criticism of the United States Parole Board, and Davis' conclusions are equally apposite here:

> How could a board member have less incentive to avoid prejudice or undue haste than by a system in

[75] In *Toney v. Reagan, supra*, the plaintiffs were nontenured college professors who sought to have the federal court enjoin their employment from being terminated. In reviewing the adequacy of the State administrative remedy, the Court of Appeals recognized that "educated college professors [who] are weighing issues of tenure and faculty qualifications," 467 F.2d at 958, at a hearing before their peers, do not require the same procedural safeguards to protect their rights as may be required by other litigants; *e.g.*, welfare recipients, *Goldberg v. Kelly*, 397 U.S. 254 (1970) and parolees, *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Griffin v. California Adult Authority*, 464 F.2d 602 (9th Cir. 1972). The vast majority of Maryland prisoners are poor and uneducated representatives of an economically and socially oppressed class. The proceedings to which their constitutional claims are relegated therefore must bear the burden of assuring that those claims are properly articulated, fully heard and fairly decided.

> which his decision can never be reviewed and in which no one, not even his colleagues, can ever know why he voted as he did? Even complete irrationality of a vote can never be discovered. Should any men, even good men, be unnecessarily trusted with such uncontrolled discretionary power? K. Davis, *Discretionary Justice* (1969).

See also, L. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183 (1973), and *Plano v. Barker*, 504 F.2d 595, 598 (2nd Cir. 1974).

3. The inability of the Maryland Inmate Grievance Commission to grant effective relief and the excessive delay by the Commission in its disposition of prisoner complaints renders the Commission an inadequate administrative remedy for purposes of exhaustion.

1. The Inmate Grievance Commission, having heard the complaint of a prisoner and believing it to be meritorious, has no power to grant relief directly to the prisoner. The Commission's decisions are subject to automatic review by the Secretary of the Department of Public Safety and Correctional Services who receives them in the form of "recommendations" (App. 327; T.60-61). The Secretary is empowered to accept, reject or modify any recommendation of the Commission which is favorable to a prisoner. Article 41, §204F(f)(2).

In addition, the Commission is not an "enforcement agency" (T.71). It has no power to exercise continuing jurisdiction over the parties before it to assure implementation of any relief which may be granted. The final decision in each case is made by the Secretary, and the responsibility for enforcement lies outside the Commission with the Secretary (T.70-72).

This Court has held that an administrative remedy is inadequate and need not be exhausted where

> the only function of the (agency) is to investigate, recommend and report. It can give no remedy. It can make no controlling finding of law or fact. Its recommendation need not be followed by any court or administrative or executive officer. *United States Alkali Export Association v. United States*, 325 U.S. 196, 210 (1945).

See also, *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963), where the trier of the facts had "no power to order corrective action."

The Inmate Grievance Commission, for all it may be worth as an informal and simple internal grievance mechanism to hear the complaints of Maryland prisoners, and to recommend relief where appropriate, is not capable of protecting the constitutional rights of prisoners who seek to vindicate their claims in federal court. The Commission does not possess any powers beyond its authority to investigate complaints, hear grievances and make recommendations to the Secretary. The final decisions of the Secretary, although they may be made in perfect good faith, are inevitably influenced by fiscal, political and administrative considerations (App. 205-207). See, *e.g., Gibson v. Berryhill, supra* at 596 Under these circumstances, the state administrative procedure is not an adequate substitute for a federal action nor may it be a prerequisitie to proceeding in federal court.[76]

[76] Robert T. Coulter, the first Executive Director of the Commission, testified at the hearings in *McCray v. Burrell*, and McCray placed Mr. Coulter's letter of resignation from the Commission into evidence. In the letter, Mr. Coulter expressed his concern over the inability of the Commission to bring about long-overdue changes in certain policies of the Maryland prison system. He described the inability of the Commission to grant effective relief, its inability to enforce or implement its decisions and the regular circumvention by the Division of Correction and Patuxent Institution of the Secretary's orders. He described the Commission as "little more than an arbiter of misery." (T. 101; Plaintiff's Exhibit 7).

2. A state remedy may be rendered ineffective for the vindication of federal constitutional rights if the remedy does not provide for prompt adjudication. See, *Gibson v. Berryhill, supra* at 575 n.14; *Strouth v. Peyton*, 404 F.2d 537 (4th Cir. 1968). If resort to a state administrative remedy requires an excessive delay in the plaintiff[s ability to return to federal court, exhaustion of the remedy may not be required.

The loss of time in the adjudication of constitutional claims is particularly harmful to prisoners. Unlike all other litigants who enjoy their freedom during the pendency of an action, a prisoner often is challenging the failure of prison officials to provide basic rights which are of immediate concern, such as the prisoner's mental and physical health, his personal safety or his ability to enjoy even the most basic amenities of prison life. See, *e.g., Woodhous v. Commonwealth of Virginia*, 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). It may not be merely the loss of income or other benefits but rather, the quality of life itself which is at stake.

The statistics in the Addendum to the Respondents' Brief, compiled from the Affidavit at App. 275-82, indicates the enormous amount of time which is required for a prisoner to receive a decision from the Inmate Grievance Commission. First, during the period from June 1, 1972 to June 18, 1973, the Commission issued a total of 238 decisions. The median time between the filing of a grievance and the issuance of a final order was five months. Second, for a total of 127 cases decided by the Commission between November 19, 1973 and February 20, 1974, the median time elapsed between the date

on which a complaint was initiated and the date on which a final decision was made was 24 weeks.

The principle that an administrative remedy may be considered inadequate on account of delay is particularly applicable to the Inmate Grievance Commission where there is only the remote possibility that the state remedy is willing or able to afford a prisoner the relief he seeks, and to require exhaustion would be to needlessly delay the final decision on his claims by a federal court.

III.

THE CONFINEMENT OF RESPONDENT McCRAY IN "MENTAL OBSERVATION" AND "ISOLATION" CELLS DENIED RESPONDENT DUE PROCESS OF LAW AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction

In reviewing the conditions existing in the solitary cells in which McCray was confined and the conduct of the petitioners in imposing this confinement, this Court is not called upon to review "legislatively authorized punishments" and therefore is not constrained by the "primacy of the legislative role [which may] narrowly confine the scope of judicial inquiry." *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (dissenting opinion of Mr. Chief Justice Burger). There exists in Maryland no specific state statute which authorizes or mandates the

maintenance of solitary cells by petitioners,[77] especially under the conditions existing in the instant cases. Accordingly, affirmance of the Fourth Circuit opinion would be consistent with "judicial findings of impermissible cruelty [resulting from] offensive punishments devised without specific authority by prison officials, not by legislators." *Id.* (citations omitted).

Furthermore, as will be discussed in more detail below, the conduct of petitioners in imposing the challenged confinements was, in several critical regards, in contravention of an existing written policy of the Maryland Division of Correction which governed the administration of the isolated confinement and mental observation cells. These circumstances negate any justifications for judicial restraint which might be relevant if the conduct of petitioners had been authorized by legislation or by administrative regulation.

Petitioners contend that the Fourth Circuit erred insofar as "it made no finding that the district court was clearly erroneous". Petitioners' Brief at 99. Petitioners seem to imply by this argument that the Fourth Circuit reversed, *sub silentio*, significant findings of fact made by the district court. This, however, is not the case. The Fourth Circuit expressly stated that it was accepting the extensive findings of fact and the questions of credibility which were resolved by the district court. 516 F.2d at 365.[78] A comparison of the factual findings of the

[77] Md. Ann. Code, Art. 27, §667 establishes the Maryland Division of Correction and §676 empowers the Commissioner of the Division to adopt rules and regulations. But there is no Maryland statute specifically authorizing or governing the use of solitary cells. *Compare, e.g.*, Art. 41, Sec. 707, Tenn. Code Ann. (Authorizing solitary confinement for violation of prison rules); Vol. 12A, Sec. 216.455, Ann. Mo. Stat. (*Accord*).

[78] "The district court made extensive findings of fact, resolving questions of credibility, and we accept those findings. We disagree, however, with the legal conclusions to be drawn therefrom." *Id.* See also, *Id.* at 367.

district court and the summary of facts of the Fourth Circuit confirms the accuracy of the Fourth Circuit's statement.[79]

The *Burrell* and *Smith* cases have several factual similarities. The initial decision in *Smith* to separate McCray from the general prison population was prompted by petitioner Smith's judgment that such separation was immediately necessary to maintain proper prison security. The decision by petitioner Burrell to separate McCray from the prison population was prompted by his judgment that such separation was necessary to preserve prison security and also, to protect McCray from potential self-imposed harm. The decision of the district court emphasized that in both cases the isolation of McCray was not disciplinary; *i.e.*, it was not imposed as punishment. 367 F. Supp. at 1215.

Once the decision to isolate McCray was made in both cases, however, the putative justification for the *nature* and *conditions* of the imposed isolated confinement was the same: to guarantee McCray's safety from self-destructive acts. It was the rationale of protection against self-harm that was offered by petitioners[80] before the district court to justify the harsh conditions of the mental observation and isolation cells. This rationale was accepted by the district court,[81] but it was rejected by the Fourth Circuit[82] as a justification for the harsh

[79] *Compare* 367 F. Supp. at 1210-1216 with 516 F.2d 365-369.

[80] *See Appendix* at 76a, 77a, 173a, 197a.

[81] "The plaintiff's clothing and mattress were removed in both cases when he was placed in an isolation cell, in a reasonable attempt to prevent him from injuring himself." 367 F. Supp. at 1215.

[82] "While we accept the district court's findings that McCray's confinement in isolated cells were not intended as punishment but for mental observation and as a precaution against a not unreasonable fear that McCray might harm himself, we are constrained to conclude that McCray's eighth amendment right to be subjected to 'cruel and unusual punishment' was violated." 516 F.2d at 367.

conditions of the mental observation and isolated confinement cells.

B. The Proper Standards of Eighth and Fourteenth Amendment Review

Respondent McCray does not in the instant cases challenge the decisions by petitioners to separate or segregate him from the general prison population on the two occasions in question. McCray concedes that there was ample cause in both instances to justify some form of immediate segregation. Indeed, it is apparent that prison officials have the right and duty to segregate troublesome or troubled prisoners from the general population in order to maintain necessary prison security or to provide protection to the inmate so separated. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. den. sub. nom., Oswald v. Sostre*, 405 U.S. 978 (1972); *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971), reh. den. 456 F.2d 1303, *cert. den. sub. nom., Sellars v. Beto*, 409 U.S. 968 (1972); *Ford v. Board of Managers*, 407 F.2d 937 (3rd Cir. 1969).

Nor does McCray contend that petitioners had an obligation to afford him an administrative hearing consistent with *Wolff v. McDonnell*, 418 U.S. 539 (1974), prior to his separation from the general population. Instead, McCray contends that his confinement under the circumstances and conditions described above denied him, in each instance, rights guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution because:

(1) The conditions existing in the solitary cells and the process followed by petitioners in imposing these periods of confinement bore no reasonable relationship to the

purpose of that confinement—the protection of McCray from himself—and were, therefore, arbitrary and unnecessarily harsh and cruel; and

(2) The conditions existing in the solitary cells were inconsistent with minimal concepts of human dignity and evolving standards of decency and are unacceptable to contemporary society.

These tests of measuring the prohibitions of the Eighth Amendment and the protections of the Fourteenth Amendment were applied by both the district court and the Fourth Circuit in analyzing the instant cases.[83] These tests are consistent with prior decisions of lower courts[84] and this Court. In *Furman v. Georgia, supra,* Mr. Justice Brennan, summarizing the Eighth Amendment decisions of this Court, concluded that the Eighth Amendment would invalidate, *inter alia*:

1) Punishments which are "so severe as to be degrading to the dignity of human beings," *Id.* at 291;

2) Punishments which are "arbitrarily" inflicted, *Id.* at 274;

[83] The Fourth Circuit stated that "we perceive that two tests for violations of the eighth amendment are relevant in the cases before us. First, are the conditions of punishment sufficiently 'shocking' that they amount to 'cruel and unusual' punishment? Second, does the punishment constitute some rational means to reach a permissible end or is it, instead, arbitrary, unreasonable, or unnecessary? The district court phrased this second test as requiring that there not be a 'less severe alternative that would have achieved the purposes for which the confinement was imposed', 367 F. Supp. at 1216, and its phraseology does not seem inaccurate to us." 516 F.2d at 368 (citations omitted). Although the language of the tests applied by the lower courts is not precisely identical to that stated by McCray above, the substance of the tests adopted by the lower courts and those offered by McCray is the same. Petitioners seem to agree that the applicable tests are those stated by the district court and the Fourth Circuit. *See* Petitioners' Brief at 95.

[84] *See* notes 109, 110, *infra.*

3) Punishments "unacceptable to contemporary society," *Id.* at 277; and

4) "Excessive" punishments. *Id.* at 279.

McCray contends that the application of these tests to the instant cases amply supports the decisions of the Fourth Circuit.[85] Two threshold observations are appropriate, however. First, while prior decisions of this Court have not directly resolved the constitutionality *vel non* of solitary confinement under conditions similar to those which marked the instant cases, this Court has, at least inferentially, questioned the constitutionality of such confinement.

Second, even though the asserted purpose for imposing the confinement challenged in the instant cases was protective rather than punitive, it is clear that the Eighth Amendment is still applicable to measure the constitutionality of McCray's confinement.

1. Prior Decisions of This Court

This Court has indicated that conditions of solitary confinement similar to those in the instant cases raise substantial constitutional questions. In *Haines v. Kerner,* 404 U.S. 519 (1972), this Court reviewed, *inter alia,* allegations that a state prisoner had been confined in a solitary cell which had a toilet but no other fixture or furnishings, was made to sleep on a concrete floor, and was denied necessary hygienic articles.[86] This Court did

[85] The two tests applied by McCray in the instant cases incorporate all four of the above standards. McCray's first test incorporates the second and fourth standards suggested by Justice Brennan, and McCray's second test incorporates Justice Brennan's first and third standards.

[86] *See* Petitioner's Brief in *Haines v. Kerner,* No. 70-5025, at 5.

not resolve the merits of the controversy but did hold that such allegations state a cause of action and accordingly, reversed the dismissal of the inmate's *pro se* complaint.

Perhaps more relevant is *Brooks v. Florida*, 389 U.S. 413 (1967) where this Court rejected, as involuntary, a state prisoner's confession of criminal conduct because it had been obtained after he had been confined on a limited diet for 14 days without clothes in a Florida prison punishment cell which contained no bed, toilet or other furnishings or external windows: Referring to this strip cell as a "sweat box", "barren cage", and "oppressive hole", the *per curiam* opinion concluded that such confinement constituted "a shocking display of barbarism which should not escape the remedial action of this court". *Id.* at 414-415.

Individual Justices of this Court, speaking for themselves, have also indicated that excessively harsh conditions of confinement can render the use of solitary cells unconstitutional. Three Justices, dissenting from a denial of certiorari in *Sellars v. Beto*, 409 U.S. 968 (1972), reviewed allegations that prisoners were confined in dark cells equipped only with combination toilet-water basins and steel bunks and deprived of other rights[87] and concluded that confinement under such conditions was "shockingly primitive". *Id.* at 968. And, Mr. Justice Douglas, concurring in *Furman v. Georgia*, 408 U.S. 238, 245 (1972), indicated his belief that solitary confinement

[87] Prisoners so confined were also afforded a limited diet, were confined for up to 15 days and denied visits and reading material. However, unlike McCray, those persons were dressed in cloth gowns and allowed to have blankets. *Id.*

may at times constitute "cruel and unusual punishment".[88]

2. The Applicability of the Eighth Amendment

In *Trop v. Dulles*, 356 U.S. 86 (1958), the government argued that denationalization was not a penalty, and therefore, that the protections of the Eighth Amendment were inapplicable. In rejecting this argument, Chief Justice Warren stated:

> "How simple would be the tasks of constituional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! *Id.* at 94.

Chief Justice Warren went on to observe that "The inquiry must be directed to the substance . . . [since] the basic concept underlying the Eighth Amendment is nothing less than the dignity of man". *Id.* at 95, 100.

Other courts have made it clear that it is the substance of the "treatment" afforded inmates, rather than the asserted motivation for such treatment, that triggers Eighth Amendment review. Accordingly, federal courts have held that the Eighth Amendment is available to review: 1) The treatment of juveniles within institutions intended to rehabilitate, not punish, them, *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Morales v. Turman*, 364 F. Supp. 166, 173 (E.D. Tex. 1973); *Inmates v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Lollis v. New York State Dept. of Social Services*, 322 F. Supp. 473

[88] One of the earlier cases to which Mr. Justice Douglas cited, *In re Medley*, 134 U.S. 160 (1889), discusses the history of solitary confinement, its effects upon prisoners, and the resulting public outcry that, at various times, in various countries, required the cessation of its use. In England, for example, solitary confinement ceased being used in the late 1700's as " 'a further terror and and peculiar mark of infamy' to be added to the punishment of death." 134 U.S. 160, 170.

(S.D.N.Y. 1970); 2) The treatment of persons confined in institutions for the mentally retarded and mentally ill where the justification for confinement is not a punitive one, *Wheeler v. Glass*, 473 F.2d 983 (7th Cir. 1973); *New York State Assoc. for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Horacek v. Exxon*, 357 F. Supp. 71 (D. Neb. 1973); *Martarella v. Kelly*, 359 F. Supp. 478 (S.D. N.Y. 1973), 3) Conditions of pre-trial detention where punishment is an unacceptable objective, *Rhem v. McGrath*, 326 F. Supp. 681 (S.D.N.Y. 1971); *Hamilton v. Love*, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971); 4) The provision of drug "treatment" to prison inmates, *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973); and 5) The institution of steps to "protect" prisoners, *Sweet v. South Carolina Dept. of Corrections*, F.2d (No. 74-1118, 4th Cir. 1975); *Landman v. Royster*, 333 F. Supp. 621, 646 (E.D. Va. 1971).

The words of then Circuit Judge Stevens, contained in a case reviewing the conditions of confinement in institutions for runaway children, are applicable:

> "Whatever the state does with the child is done in the name of rehabilitation. Since—the argument runs—by definition the treatment is not 'punishment', it obviously cannot be 'cruel and unusual punishment.' But neither the label which the state places on its own conduct, nor even the legitimacy of its motivation, can avoid the applicability of the Federal Constitution. We have no doubt that well-intentioned attempts to rehabilitate a child could, in extreme circumstances, constitute cruel and unusual punishment proscribed by the eighth amendment. *Vann v. Scott*, 467 F.2d 1235, 1240 (7th Cir. 1972)."

These cases support the conclusion of the Fourth Circuit that the humane purposes underlying McCray's

isolation do not remove the prison's actions from Eighth Amendment scrutiny. "[T]he answer is that isolation of McCray occurred within a prison context . . . His confinement, in whole and in part, was punishment for his misdeeds. Thus, all of his confinement was subject to the restrictions of the Eighth Amendment." 516 F.2d at 367.

C. Application of the Proper Standards to the Instant Cases

1. The Conditions Existing in the Solitary Cells and the Process Followed by Petitioners in Imposing These Periods of Confinement Bore No Reasonable Relationship to the Purposes of That Confinement—The Protection of Respondent From Himself—And Were, Therefore, Arbitrarily and Unnecessarily Harsh and Cruel

State action which denies liberty, for however brief a period, must be reasonably related to legitimate state goals. This is a principle inherent in both the proscription of "cruel and unusual punishment", and the guarantee that liberty shall not be denied without due process. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).[89] The application of this test to the instant cases supports the Fourth Circuit's decisions.

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[89] *See also McNeil v. Director*, 407 U.S. 245 (1972); *Gilmore v. Lynch*, 319 F. Supp. 105, *aff'd. sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971). In *Gilmore*, the trial court stated that "prison rules must pass the basic test of due process reasonability, with that test being more or less stringent according to the right taken from the prisoner." *Id.*, at 109, n.6.

(a) McCray v. Burrell

As discussed above, the constitutionality of the confinement of McCray in this case must be measured by analyzing the reasonableness of the means chosen by petitioners to accomplish an admittedly legitimate goal—protection of an inmate from self-destructive acts. The means chosen in this case were unreasonable for several reasons. First, a directive of the Division of Correction, effective August 10, 1970 (see, Addendum to Respondents' Brief; Plaintiff's Exh. 3; App. 186), provides that "An inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified . . . This directive went on to add that "The psychologist/psychiatrist should be contacted *immediately* after the confinement of the inmate, and the inmate should evaluated within a twenty-four (24) hour period."[90] (Emphasis added). 516 F.2d at 368.

McCray was placed in the mental observation cell at about 9:45 A.M. on January 1st. 516 F.2d at 366. Prior to being placed in the cell he was treated in the dispensary at which time the nurse, purportedly acting in accordance with the written directive mentioned above, contacted a physician and informed him that McCray had been placed in the mental observation cell. That physician told her to communicate this fact to another physician who she was unable to reach. *Id.* at 366-367.

[90] Maryland Division of Correction Policy Directive No. 12-70, effective 8/10/70. This directive also provides for the release of a prisoner from isolation when he "is reasonably calm enough to go to a segregation area without being disruptive."

At no time during McCray's confinement was he seen by a physician, nurse, psychologist, psychiatrist or medical officer of any kind. Nor did petitioner Burrell make any attempt whatsoever to initiate a medical visit for McCray or to obtain compliance with the above directive.[91] The following excerpt from trial transcript containing cross-examination of petitioner Burrell is instructive:

"Q. And what, if anything, thereafter [after placing McCray in mental observation] did you do, was there anything else that you did?

A. I can't remember specifically doing anything particularly after him being checked by the nurse on duty and having been placed in the mental observation unit." App. 172a.

This failure on Burrell's part to comply with the policy was completely arbitrary and unreasonable. While the Fourth Circuit did not require that Burrell *guarantee* that "expert attention would be forthcoming immediately," 516 F.2d at 369, as captain of the day shift (*see* App. 170a-171a, 173a, 179a, 185a), Burrell was responsible for the administration of the whole penitentiary including the control and security of the medical facility within the prison. (*See* App. 186a). Burrell should reasonably have attempted, after placing McCray in the mental observa-

[91] The Fourth Circuit concluded that petitioner Burrell "took steps to comply with the institution's written directive to obtain promptly the services of an expert to evaluate McCray's condition at or about the time that he ordered McCray's special confinement." 516 F.2d at 369. However, the district court's opinion is devoid of such a finding, stating only that "Captain Burrell followed an administrative directive when he confined the plaintiff in the mental observation area. . ." 367 F. Supp. at 1217. The record is silent on why Nurse Weber decided to call a medical doctor after the decision to place McCray in mental observation was made (App. 203a-204a), and contains no evidence whatsoever that Burrell attempted to obtain an expert evaluation of McCray. In fact, the evidence is to the contrary. *See* App. 187a.

tion cell, to obtain expert medical help for McCray as soon as possible. If such help were not forthcoming, it was incumbent upon Burrell to devise other means "to protect McCray from injury to himself other than by continued isolation with deprivation of clothing and elements of personal hygiene."[92] 516 F.2d at 369.

This responsibility for taking some further steps to ameliorate McCray's condition was appropriately Burrell's, not only because of his position, but also because he personally ordered McCray's confinement in mental observation, despite a nurse's suggestion that he remain in the infirmary. Burrell personally decided that it would be necessary, as part of that confinement, to remove McCray's clothing and deny McCray bedding, hygienic articles and all other necessities of life.

The Fourth Circuit, in adopting the policy in the prison regulation, *supra*, as a statement of minimal constitutional standards, did not err as petitioner contends. *See* Petitioners' Brief at 95-96, 99. The policy provides for the reasonable requirement that in instances where inmates are displaying "mentally disturbed behavior" and are placed in isolated confinement with its accompanying harsh conditions (for purposes, *inter alia*, of self-protection), immediate steps must be taken to cope with an admittedly emergency situation.

[92] The confinement of McCray in an isolation cell in the "south wing" area might have been one alternative which would have protected respondent and still allowed him to remain fully clothed and to exercise basic privileges. The continual presence in this area of a correctional officer, at least during the day shift (App. 82a, App. 104a), the time McCray was initially confined in the mental observation cell would have guaranteed his safety. *See* model policies and policies of other jurisdictions, *infra*, for other suggestions on feasible alternatives to the continued nude confinement of McCray in the bare mental observation cell.

Such a policy is consistent with universally suggested operating policy for the administration of similar isolation cells in prisons throughout the country. The standards of the American Correctional Association,[93] for example, require daily medical visits for inmates placed in solitary confinement as does the Model Penal Code.[94] The applicable policy of the Federal Bureau of Prisons provides that:

> "If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the medical department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the medical officer."[95]

The policy also requires that "Each segregated inmate shall be seen daily by a member of the medical department and one or more responsible officer[s] . . ."[96]

[93] *See Manual of Correctional Standards*, American Correctional Association (College Park, Maryland) at 419.

[94] *See* §304.7(3), *Model Penal Code, Part III Treatment and Correction* (American Law Institute 1962).

[95] *See* §11(c)(3) Federal Prison System, *Policy Statement No. 7400.5D* (7-7-75) at 19. The policy also provides that "any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff." *Id.* at §11(c)(1).

[96] *See* §11(c)(9) at 20.

Other model policies[97] and the regulations of other correctional systems[98] are in accord with the above suggested practices.

The Maryland policy, therefore, contains a "rule of reasonableness", *Jackson v. Indiana, supra*, 406 U.S. at

[97] A handbook published by the National Sheriffs' Association, also recommends that: "The [jail's] medical officer should be notified immediately" if "a seriously disturbed prisoner is placed in segregation", and that "all segregated prisoners should be examined by medical personnel upon being placed in segregation or within twenty-four hours thereafter . . . '*A Handbook on Inmates' Legal Rights*, National Sheriffs' Association (1974) at 28. In another publication of this Association, it is suggested that "special precautions" should be taken in cases of "mental observation prisoners", including, *inter alia*: 1) having a "specially trained officer . . . note the conduct and actions of the prisoner at least once every thirty minutes" and 2) having "the psychiatrist or physician examine the prisoner frequently . . ." *Manual on Jail Administration*, National Sheriffs' Association (1970) at 101-102. And, minimum rules for the treatment of prisoners, promulgated by the United Nations, prescribe that prisoners being punished by "close confinement" "shall" be visited daily by the medical officer. *See Compendium of Model Correctional Legislation and Standards*, American Bar Association and Council of State Governments (hereafter Compendium) at IV-11.

[98] For example, Art. 34, Sec. 529, Maine Rev. Stat. (1975 Supp.) guarantees that "when solitary confinement or segregation exceeds 24 hours, the head of the institution shall cause the institution physician or a member of the institution's medical staff to visit the person forthwith, and at least once in each succeeding 24 hour period in such confinement thereafter, to examine into the state of health of the person". Vol. 7 (Correctional Services) Chapter 6, Part 303 (Segregation Units) of the New York Code of Rules and Regulations provides that "Every inmate confined in a segregation unit shall be visited by the facility health services director or a physician, nurse or physician's associate . . . who shall examine into the inmate's health within 24 hours of the commencement of such confinement and once in every 24 hour period thereafter for the duration of the confinement". *Id* at Part 303.3.

731, that is widely accepted and considered by correctional authorities to be an essential step in avoiding the arbitrary infliction of pain. The requirements of that policy mirror the constitutional requirement which is at the heart of the Eighth and Fourteenth Amendments, *i.e.*, the avoidance of arbitrary and unnecessary suffering. It is this underlying constitutional mandate that was violated by the process and conditions surrounding the confinement of McCray. Because this "rule of reasonableness" underlies the policy, the Fourth Circuit's adoption of the policy as a benchmark of constitutionality is not inappropriate. Nor is the Court's approach a novel one. *See e.g., Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (adopting American Correctional Association standards as an expression of minimally acceptable constitutional conduct); *Jordan v. Fitzharris*, 257 F. Supp. 674, 683 (N.D. Calif. 1966) (*Accord*).[99] Indeed, the Fourth Circuit's action in this regard constitutes a proper deference to the judgment of prison officials. *See e.g., Procunier v. Martinez*, 416 U.S. 396 (1974).[100]

[99] Outside the prison context also, it is not an uncommon judicial technique to attach great weight to standards established by administrators in determining minimum constitutional requirements. See, *e.g., Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, 731 (5th Cir. 1965); *United States v. Jefferson County Board of Education*, 380 F.2d 385, 390 (5th Cir. 1967), cert. denied 389 U.S. 840 (1967) (HEW Guidelines used to establish minimum standards in school desegregation cases); *United States v. Washington*, 328 A.2d 98, 100 (D.C. Ct App. 1974); *State v. Falcone*, 195 N.W.2d 572, 577 (Minn. 1972) (ABA Standards for Criminal Justice, The Prosecution Function and the Defense Function, Prosecution Function, §§3.1(b) and 3.6(d), used to determine whether the constitutional rights of an accused were violated by the conduct of a prosecutor in a grand jury proceeding.).

[100] *See* Note, *Prison Discipline and the Eighth Amendment: A Psychological Perspective*, 43 U. of Cin. L. Rev. 101, 129-131 (1974) (Suggesting that the adoption, on a case by case basis, of Model Standards as benchmarks of constitutionality gives proper deference to penological expertise and helps assure that minimal constitutional standards are consistent with "the progress of a maturing society.").

The solitary confinement of McCray was arbitrary and unreasonable for another reason. Burrell neither conducted an investigation to confirm his initial, summarily reached conclusion that McCray required such restrictive confinement, nor did he periodically review McCray's condition to see if the *continued* confinement of McCray in the mental observation cell was necessary. The factual premise which supported Burrell's judgment that McCray was dangerous to himself, *i.e.* that McCray had purposefully set the fire in his cell, was therefore never explored. Nor was the possibility that McCray's mental state might well have changed during the time which he was confined in the mental observation cell.[101] Burrell's decision to continue the harsh confinement of McCray was, therefore, not "premised on facts rationally determined," a minimal requirement of due process. In *O'Connor v. Donaldson*, ____ U.S. ____, 95 S. Ct. 2486, 2493 (1975), this Court said: "Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." (citations omitted). See also, *Sostre v. McGinnis*, *supra*, 442 F.2d at 198 (2nd Cir. 1971). *Accord*, *Wright v. McMann*, 460 F.2d 126, 130 (2nd Cir. 1972); *Ferrall v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972).[102]

[101] The mandate in Policy Directive No. 12-70 that a prisoner be released from isolation when he "is reasonably calm enough to go to a segregation area without being disruptive", implies some requirement of a continual review and supervision.

[102] In *Wolff v. McDonnell*, *supra*, this Court did not discuss whether the due process procedures required in disciplinary cases would be applicable where the same sanction was used for "protective" reasons. However, this Court did find solitary confinement appropriate "only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good-time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction." *Id.* at 571, 572 n.19.

Many of the *conditions* existing in the mental observation cell were, like the *process* used to impose such confinement, arbitrary, bearing no relationship to the goal of self-protection. There is no evidence, for example, to indicate that McCray had to be confined naked, denied access (supervised if necessary) to hygienic materials (including soap and toilet paper), toilet facilities, or reading material. Nor is there a basis which could justify the absence of cell cleanliness and the failure to maintain an appropriate temperature in the cell. These conditions did not reasonably advance the goal of self-protection. If McCray had been intent on self-destruction, the unpadded concrete walls of the mental observation cell presented as great an opportunity for self-injury as the possession of the above items.

It is again relevant in assessing the necessity for such deprivations to consult the suggested and actual policies of other correctional authorities and systems. See *Furman v. Georgia*, *supra*, 408 U.S. at 277-278; *Sostre v. McGinnis*, *supra*, 442 F.2d at 192-192. These model[103]

[103] §3 of *An Act To Provide For Minimum Standards For The Protection of Rights of Prisoners*, prepared by the National Council on Crime and Delinquency (1972) provides, for example, that "the cell in which the prisoner is confined in solitary shall be at least as large as other cells . . . shall be adequately lighted during daylight hours. All of the necessities of civilized existence, such as a toilet, bedding, and water for drinking and washing, shall be provided. Normal room temperatures for comfortable living shall be maintained. If any of these necessities are removed temporarily, such removal shall be only to prevent suicide or self-destructive acts, or damage to the cell and its equipment . . . under no circumstances shall a prisoner confined in solitary be deprived of normal prison clothing except for his own protection. If any such deprivation is temporarily necessary, he shall be provided with body clothing and bedding adequate to protect his health." *See* Compendium, n. 29, at IV-54. Similarly, the *Manual of Correctional Standards*, *supra*, n. 20, provides that: "the punitive segregation cell and all cells in it should be evenly heated and adequately lighted and ventilated.

(continued)

and presently effective[104] policies uniformly require the maintenance of necessary cleanliness and temperature

(footnote continued from preceding page)
Artificial ventilation is usually necessary. High sanitary standards should be maintained, bathing facilities should be provided in the section and inmates permitted to bathe frequently." *Id* at 415. See also, *A Handbook On Inmates' Legal Rights*, *supra*, n.24 at 28 ("Prisoners in segregation should be given an opportunity for exercise and should have the same rights to mail and reading matter as other prisoners. Segregated prisoners should be able to maintain the same level of personal hygiene as other prisoners. They should be provided with the same toilet articles and have the same bathing and shaving schedule as the rest of the jail population.").

[104] The Federal Bureau of Prisons requires, for example, that "the quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times." Policy Statement No. 7400.5D (7-7-75), §11(c)(1) at 19. See also, for example, Art. 34, Sec. 529, Maine Rev. Stat. (1975 Supp.), which guarantees the maintenance of "adequate sanitary and other conditions required for the health of the person" confined in solitary or segregation. Chapter 127, Sec. 40 Mass. Gen. Laws Ann. (1974), requires that those prisoners confined in the isolation unit must be provided with "light, ventilation and adequate sanitary facilities . . .". The rules of the New York Prison System require that "the officer in charge of a segregation unit shall take special precautions to see that: a) the highest degree of cleanliness is maintained at all times; . . . e) inmates maintain personal cleanliness; and f) medical attention is furnished when needed . . ." Chapter 6, §303.7, New York Code of Rules and Regulations. The provisions of the New Jersey Administrative Code relevant to the prison system provide that "Administrative segregation is used as close supervision when it is necessary to segregate certain inmates from the general population for *inter alia*, . . . the protection of themselves or others". Such segregation quarters must maintain normal ventilation and room temperature and light of sufficient illumination to allow clear visual observation of the inmates. It is also required that the rooms be kept "clean and sanitary" and that each room contain "a bed and clean mattress" and that "inmates have independent access to toilet facilities". New Jersey Administrative Code, Sub-title F, Sec. 10:35-6.1, 6.4. The relevant rules of the Montana State prison system provide that even "extremely violent or suicidal" prisoners are entitled to blankets, mattresses, shorts, and rubber shower slippers, unless "otherwise specified by a doctor or psychiatrist". In instances where an inmate is suicidal or violent, the judgment to allow or disallow that inmate other personal items is a medical or psychiatric judgment. *See* Montana State Prison Rules and Guidelines.

and the provision of necessary hygienic articles to inmates confined in solitary or isolation cells.

While it might be argued that the denial of clothing and bedding is at least reasonably related to the prevention of suicidal acts such as self-imposed hanging or strangulation (although the use of paper clothing and other similar materials would seem to accomplish the same result), the *complete* denial of such basic items is excessive and unnecessary—a pointless infliction of suffering—in light of the significantly less severe alternatives that allow for the maintenance of some human dignity while achieving prevention of self-destruction.[105]

Without the protections against arbitrariness suggested above there is a substantial chance that the imposition of solitary confinement, even for self-protection, will contribute to, rather than ameliorate, an inmate's disturbed emotional state.[106]

[105] The National Sheriffs' Association *Handbook on Inmate Legal Rights*, for example, provides that "Under no circumstances should a prisoner in segregation be deprived of normal jail clothing except for his own protection. If such deprivation is temporarily necessary, he should be provided with a one-piece garment and bedding adequate to protect his health." *Handbook*, *supra*, n. 24 at 28. The National Council on Crime and Delinquency has suggested model standards which include a similar provision. *See* n. 29, *supra*. *See, e.g. Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971) (Nude confinement of an inmate is appropriate only if approved by a physician).

[106] While "isolation may bring short-term conformity for some, . . . it brings increased disturbances and deeper grained hostility to more." *Manual of Correctional Standards*, *supra*, n. 20, at 413. Empirical evidence indicates that solitary confinement may well result in psychological destruction rather than emotional regeneration. *See Singer, Confining Solitary Confinement: Constitutional Arguments For a "New Penology"*, 56 Ia. L. Rev. 1251, 1264-1272. This Court has recognized this possibility, *see In re Medley*, 134 U.S. 160, 167-8 (1890), and McCray's testimony indicated that this may have been an actuality in his case: "I recall breaking down a couple of times there during the night when I couldn't sleep, twisting, turning, when I would lay on my hand and feel the pain from it, breaking down and crying, not so much because of the pain, but because I just couldn't get anybody to do anything for me at a time that I really needed something done." App. 154a.

(b) McCray v. Smith

McCray contends that his confinement by petitioner Smith in the isolation cell also denied him rights guaranteed by the eighth and fourteenth amendments since the process of imposing such confinement and the conditions of such confinement did not reasonably advance the goal of self-protection. McCray does not quarrel with petitioner Smith's decision to segregate him from the population. However, McCray agrees with the conclusion of the Fourth Circuit that

> "If McCray's mental condition was reasonably believed to be so suspect as to justify the conditions we have described, then it was such as to warrant, if not the actual ministrations of professional personnel, an immediate effort to gain him prompt medical evaluation and necessary treatment." 516 F.2d at 368.

Smith, like Burrell, completely neglected his duty to "immediately" notify, or cause to be notified, the psychologist/psychiatrist at the Maryland Penitentiary after he instituted McCray's isolation. *See* Policy Directive 12-70. As the Fourth Circuit noted "By his own admission, Smith did not seek expert professional help until nearly twenty-four hours after he isolated and stripped McCray". *Id.* In light of the severe and harsh conditions of McCray's confinement and the reasons for said confinement, this failure did, as the Fourth Circuit concluded, reach constitutional proportions. Without the provision of an immediate medical evaluation there can simply be no conclusion that McCray's confinement did not constitute the arbitrary, excessive and unnecessary infliction of pain. *See Furman v. Georgia, supra.*

The conditions of McCray's confinement were also, in several pertinent regards, arbitrarily and unnecessarily

harsh. While McCray's cell did contain a toilet and a sink, his "bed" was a concrete slab, and he was deprived of essential articles of hygiene including "such seemingly innocuous articles as a bar of soap or a toothbrush", 516 F.2d at 368, as well as such essential ingredients of human existence as heat, clothes and blankets. For the reasons discussed above, McCray contends that the denial of these basic necessities was unnecessary[107] and thus, unconstitutional.

2. The Conditions Existing in the Solitary Cells Were Inconsistent With Minimal Concepts of Human Dignity and Evolving Standards of Decency and Are Unacceptable to Contemporary Society.

"The basic concept underlying the eighth amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1968). The treatment of McCray must be measured in this light and by "evolving standards of decency that mark the progress of a maturing society". *Id.* Punishment which is mentally and emotionally traumatic as well as physically cruel is prohibited by the eighth amendment since "the available evidence does not support the . . . conclusion that only torturous punishments were to be outlawed . . .". *Furman v. Georgia, supra*, 408 U.S. at 263.[108]

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[107] The lack of necessity for these deprivations is made apparent in light of the presence, within the isolated confinement area, of a correctional officer, at least during the day shift, an official who could have personally supervised McCray.

[108] *See* also *LaReau v. MacDougall*, 473 F.2d 974 (2nd Cir. 1972), *cert. den.*, 414 U.S. 878 (1973). *See generally*, *Singer, supra*, n.32 at 1273-76 and cases cited therein.

Numerous opinions of circuit[109] and district court[110] judges support the conclusion that the confinement of McCray in the mental observation and isolation cells was in each case, a violation of the eighth amendment. These opinions have applied a "totality of the factors" test, relying, at least in part, on the existence of the following factors to justify the invalidation of such confinement: 1) denial of clothes or bedding to inmate[111] 2) absence in

[109] *See LaReau v. MacDougall, supra; Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975); *Poindexter v. Woodson,* 510 F.2d 464 (10th Cir. 1975); *Knuckles v. Prasse,* 302 F. Supp. 1036 (E.D. Pa. 1969); *aff'd. per curiam,* 435 F.2d 1255 (3rd Cir. 1970), *cert. den.*, 403 U.S. 936 (1971); *Wright v. McMann,* 460 F.2d 126 (2nd Cir. 1972); *Anderson v. Nosser,* 438 F.2d 183 (5th Cir. 1971), reh. *en banc* modifying earlier decision, 456 F.2d 835 (1972); *Black v. Brown,* 513 F.2d 652 (7th Cir. 1975); *Finney v. Arkansas Board of Correction,* 505 F.2d 194 (8th Cir. 1974).

[110] *See, e.g., Jordan v. Fitzharris,* 257 F. Supp. 674 (N.D. Calif. 1966); *Hancock v. Avery,* 301 F. Supp. 786 (M.D. Tenn. 1969); *Landman v. Royster,* 333 F. Supp. 621 (E.D. Va. 1971); *Kelly v. Brewer,* 378 F. Supp. 447 (S.D. Ia. 1974); *Negron v. Preiser,* 382 F. Supp. 535 (S.D.N.Y. 1974); *Osborn v. Manson,* 359 F. Supp. 1107 (D. Conn. 1973); *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362, *aff'd.* 442 F.2d 404 (8th Cir. 1971); *Allen v. Nelson,* 354 F. Supp. 505 (N.D. Calif. 1973). *See also, Lollis v. New York State Dept. of Social Services,* 322 F. Supp. 473 (S.D.N.Y. 1970); *Williams v. Wainwright,* 350 F. Supp. 333 (M.D. Fla. 1972) (consent decree); *Goldsby v. Carnes,* 365 F. Supp. 395 (W.D. Mo. 1973) (consent decree); *Jones v. Wittenberg,* 330 F. Supp. 707 (N.D. Ohio 1971); *Campise v. Hamilton,* 328 F. Supp. 172 (S.D. Tex. 1974); *Inmates v. Affleck,* 346 F. Supp. 1354 (D.R. 1972); *Morales v. Turman,* 364 F. Supp. 166 (E.D. Tex. 1973).

[111] *Poindexter v. Woodson, supra; Gates v. Collier, supra; Wright v. McMann, supra; Knuckles v. Prasse, supra; Black v. Brown, supra; Kelly v. Brewer, supra; Negron v. Preiser, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Landman v. Royster, supra.*

the cell of adequate toilet facilities and other furnishings,[112] 3) unsanitary and unclean cell conditions,[113] 4) inadequate heat,[114] 5) denial of regular medical visits,[115] and 6) denial of a daily opportunity to exercise outside the cell.[116]

In *Burrell,* McCray was denied all these "basic necessities of human existence." *Finney v. Ark. Bd. of Correction, supra* at 207. His confinement in *Smith* was, with the exception of the denial of a toilet and sink and the provision of an old and deteriorated mattress, similarly brutal and dehumanizing.[117]

[112] *Gates v. Collier, supra; LaReau v. McDougall, supra; Poindexter v. Woodson, supra; Knuckles v. Prasse, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra.*

[113] *Gates v. Collier, supra; Poindexter v. Woodson, supra; Black v. Brown, supra; Knuckles v. Prasse, supra; Wright v. McMann, supra; Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Kelly v. Brewer, supra; Negron v. Preiser, supra; Landman v. Royster, supra; Holt v. Sarver, supra.*

[114] *See, e.g., Wright v. McMann, supra; Landman v. Royster, supra.*

[115] *See, e.g., Landman v. Royster, supra; Williams v. Wainwright, supra; Jones v. Wittenberg, supra.*

[116] *Osborn v. Manson, supra; Bauer v. Sielaff,* 372 F. Supp. 1104 (E.D. Pa. 1974).

[117] McCray does not share the conclusion of the Fourth Circuit that the conditions of confinement in *McCray v. Smith,* come *only* "perilously close to a denial of eight amendment rights", 516 F. 2d at 368. Although the provision of a toilet and sink places this confinement a step above the confinement suffered by McCray in *Burrell,* the denial of clothes and adequate bedding, denial of necessary hygienic articles, and the failure to maintain adequate temperature within the cell do bring this confinement within the scope of many of the above-cited cases. *See, e.g., Finney v. Ark. Bd. of Correction, supra; Holt v. Sarver, supra; Knuckles v. Prasse, supra; Wright v. McMann supra; Black v. Brown, supra; Landman v. Royster, supra; Lollis v. N.Y. State Dept. of Soc. Serv., supra; Inmates v. Affleck, supra.*

The fact that the duration of McCray's confinement under these conditions was in each case, approximately two days and not longer, presents no constitutional justification for such confinement. *See Gates v. Collier, supra,* (48 to 72 hours in solitary confinement held unconstitutional); *Knuckles v. Prasse, supra,* (2½ days in solitary found to be unconstitutional); *Hancock v. Avery, supra,* (Solitary "confinement under the conditions of harshness and cruelty reflected by the present record should not be tolerated for any length of time, however brief"). Nor is the prevention of self-destructive acts, *Hancock v. Avery, supra; Jordan v. Fitzharris, supra; Negron v. Preiser, supra,* or the protection of others, *see, e.g., Kelly v. Brewer, supra,* or the prevention of escape, *see e.g., Hancock v. Avery, supra,* a justification for confinement under such conditions.

The holding of these and similar cases is that whatever the provocation, dehumanizing and degrading conditions such as those suffered by respondent cannot be constitutionally justified. The policies and practices discussed above, condemning many of the conditions incident to McCray's confinement, provide objective indicators that such confinement is "unacceptable to contemporary society". *Furman v. Georgia, supra,* 408 U.S. at 277. The history of the use of such confinement is, like the comparable history of the use of the death penalty, "one of successive restriction."[118] *Furman v. Georgia, supra,* 408 U.S. at 299. Indeed, the decision of the Maryland Department of Public Safety, in 1974, to permanently close the unit containing the mental observation cells and to discontinue their use[119] is consistent with this history

[118] *Compare In re Medley, supra,* with the material in footnotes 97-105.

[119] See, Respondents' brief in opposition to the petition for certiorari at 22.

of successive restriction, further indicating the lack of necessity for such confinement and the inconsistency between such confinement and "evolving standards of decency". *Trop v. Dulles, supra,* 356 U.S. at 100-01.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondents

APPENDUM A

LEE AVON JOHNSON	*	NO. 9934 LAW DOCKET 16
VS.	*	IN THE CIRCUIT COURT
ROBERT J. LALLY	*	FOR WASHINGTON COUNTY

* * * * * * * * *

JAMES O. TULL	*	NO. 097185, PAGE 137
VS.	*	IN THE BALTIMORE CITY
ROBERT J. LALLY	*	COURT

* * * * * * * * *

CHARLES H. TAYLOR	*	NO. A-7386
VS.	*	IN THE CIRCUIT COURT
ROBERT J. LALLY	*	FOR HOWARD COUNTY

* * * * * * * * *

ORDER OF COURT

The matter of the consolidated appeals from Decisions of the Secretary of Public Safety and Correctional Services having come before the Court for hearing, and after hearing argument of counsel, and in accordance with the Memorandum Opinion filed herein,

IT IS HEREBY ORDERED, This 28th day of January, A.D. 1976, that the Decision of the Secretary of Department of Public Safety and Correctional Services in each of these three cases be and the same is hereby affirmed.

/s/Paul Ottinger,
Paul Ottinger,
Associate Judge

MEMORANDUM OPINION

JOHNSON CASE:

Appellant was transferred from the Maryland Correctional Institution in Washington County to the Maryland Penitentiary in Baltimore on March 3, 1975 to have x-rays taken. He was instructed to undress and leave his clothes in an adjacent room. When Appellant returned to this room, after the x-rays were taken, he alleges that he saw another prisoner named Durrell Shelton leaving the area with the leather coat and that he (the Appellant) notified a Correctional Officer named Reginald Johnson, who allegedly was at the scene. It is further alleged that Shelton was not apprehended and that he was permitted by the authorities to leave the area. The coat was not recovered.

Appellant filed a Petition with the Maryland Inmate Grievance Commission requesting the return of his coat or compensation in the amount of $115.00, charging that the coat was lost as a result of the negligent conduct of the prison officials.

After the hearing, the Commission found that the coat was in fact lost as a result of the negligence of the employees of the Penitentiary and recommended that the Appellant be reimbursed in the amount of $115.00 The Secretary of Public Safety and Correctional Services reversed the decision of the Commission and held that:

> ". . . it is our opinion that neither the Inmate Grievance Commission nor the Secretary of the Department of Public Safety and Correctional Services has the authority to award money damages in a complaint of negligence by an inmate against the officers or employees of the Division of Correction or Patuxent Institution. . . ."

TULL CASE:

On March 13, 1974, this Appellant was placed in isolation at the Penitentiary for allegedly being in possession of fermented juices at which time he gave two rings to a Lt. Kane. The Institution stipulated that Tull had two rings and that only one of them was returned to him when he was released from segregation on April 19, 1974. The missing ring had not been registered with the Institution as required by regulation and therefore there was no description of it or statement of its value among the records of the Penitentiary. The Inmate Grievance Commission found that the ring was lost because of the negligence of an employee and that the Institution must be responsible. One of the difficulties of this case arose from the fact that the Appellant claimed that the missing ring was worth more than $1,000.00, but the Commission found that a fair market value would be $150.00 and that the Institution should pay Tull this amount.

The Secretary reversed the decision of the Commission in this case also on the same ground as in the Johnson case.

TAYLOR CASE:

This Appellant arrived at Patuxent Institution on January 30, 1974 with several boxes of personal property. On or about June 13th of that year, Taylor was apparently relocated within the Institution and his personal property was brought to him by a Correctional Officer. The Appellant claimed that some of his property was missing. Taylor claimed $176.31 as the value of the missing property and the Commission did find in his favor, but allowed him only $24.00 as the value of three

sport shirts which the Commission decided had in fact been lost. The Commission found in this case also that the property was lost because of the negligence of the employees of the Institution.

The Secretary reversed the decision of the Commission in this case also on the same ground as in the Johnson case.

These cases were ordered consolidated for hearing and this Judge was designated to sit in all three cases by Chief Judge Robert C. Murphy dated November 13, 1975.

The issue before this Court is whether the State Correctional Institutions are liable for money damages arising out of the loss of an inmate's personal property entrusted to the Institution where he is confined.

It is well established in Maryland that the State cannot be sued without its consent, unless specific legislative authority has been given and, even so, if there are no funds available for the satisfaction of the judgment, or no power reposed in the agency for the raising of funds necessary to satisfy a recovery against it. *University of Maryland v. Maas*, 1973 Md. 554.

> *Artic 41, Section 204F(d)* states: "Any person confined to an institution within the Division of Correction, or otherwise in the custody of the Commissioner of Correction, or confined to the Patuxent Institution, who has any grievance or complaint against any officials or employees of the Division of Correction or the Patuxent Institution, may submit such grievance or complaint to the Inmate Grievance Commission within such time and in such manner as prescribed by regulations promulgated by the Commission."

This language seems to be broad enough to cover the complaints before the Court. However, Sections (a) and (b) provides that the members of the Inmate Grievance

Commission and its employees may be compensated "as provided in the budget".

> *Section (f)(2)* of *Article 41, Section 204F* provides that: "However, if after the hearing, the Commission in its order finds that the inmate's complaint was in whole or in part meritorious, such order shall be promptly forwarded to the Secretary of Public Safety and Correctional Services. Within fifteen days of the receipt of such an order, the Secretary by order shall affirm the order of the Commission, or shall reverse or modify the order where he disagrees with the findings and conclusions of the Commission. The Secretary shall order that the appropriate official of the institution in question accept in whole or in part the recommendation of the Commission or the Secretary may take whatever action he deems appropriate in light of the Commission's findings."

There is no reference here to awarding money damages.

At the hearing before this Court, the Attorney for the Appellants, conceded that the argument of the Attorney General that the Inmate Grievance Commission was not authorized by this Statute to order the Department of Correction to pay money damages in such cases was sound; but he argued that the Commission was authorized to order the particular Correctional Officer or other employee of the institution to pay damages for property lost because of the negligence of such employee. There is nothing in the Statute which would authorize any such result because, of course, the determination of losses caused by the negligence of a bailee also is the function of the civil courts of this State.

The Attorney for the Appellants also stated during the argument that the Attorney General had taken the position, in a case now pending before the Supreme

Court, that the Inmate Grievance Commission Law gave these Appellants an adequate remedy in cases such as this. The Attorney General admitted that he had taken such a position but averred that this was an error.

The Statute establishing the Inmate Grievance Commission seems to give that Commission, and the reviewing Courts, powers comparable to those exercised in equity and was intended to authorize the Commission and the Secretary to order the officials and the institutions in the correctional system to cease practices which infringed on constitutional rights. *McCray v. Burrell*, 367 F. Supp. 1191.

This Court finds that the State of Maryland has not taken any legislative action which would waive its governmental immunity in cases such as this. Specifically, the Court finds that the Inmate Grievance Commission Act does not authorize suits against the Correctional Institutions for money damages.

The Court finds further that the doctrine of governmental immunity may not be evaded by filing an action against an officer or an employee of the State as was suggested by the Attorney for the Appellants when these cases were argued. *Stanley v. Mellor*, 168 Md. 465, *Red Star Line v. Baughman*, 153 Md. 607.

This Court finds that the Secretary of Public Safety and Correctional Services was not in error when he reversed the decision of the Inmate Grievance Commission in these three cases.

Section (1) of *Section 204F* of *Article 41*, restricts this court's review to a determination of whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements; and this Court finds that there was no such violation in any of these cases.

/s/Paul Ottinger.
Paul Ottinger,
Associate Judge

Dated: January 28, 1976.

ADDENDUM B

35.
PRETRIAL PROCEDURE

(a) In any action the Court may in its discretion direct the attorneys for the parties to appear before it for a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure. Unless otherwise ordered, all pretrial conferences shall be held before a judge in open court or in chambers and an official court reporter may be present. At least one of the attorneys for each of the parties, who will actually participate in the trial shall appear at and conduct the pretrial conference. Each attorney shall be familiar with all aspects of his case before the pretrial conference, and if necessary, shall obtain prior authority from his client to enter into stipulations with reference to as many facts and issues as practicable. If an attorney for a party fails to appear at a pretrial conference, or otherwise fails to abide by the requirements of this rule, the judge may take such action, including the impositions of sanctions, as he may deem appropriate.

(b) Upon the designation of a case for pretrial conference, the Court or Clerk shall mail or otherwise deliver a "Notice of Pretrial conference" to the attorneys of record, giving them at least twenty days' notice of the place and date of the conference; such notice need be furnished only to Maryland counsel unless a judge shall otherwise order. The notice shall direct that plaintiff's attorney shall file in the chambers of the judge not later than five (5) days before the conference, a proposed pretrial order signed by the attorneys for all parties in the event they can agree. The proposed pretrial order shall be

drafted by the attorney for the plaintiff and submitted to all other parties in the case for review, revisions, and execution. If counsel are unable to agree upon any particular provision of the proposed pretrial order, counsel for each party shall instead submit by that date a draft of his proposal for said provision with the proposed pretrial order. The proposed pretrial order shall contain at least the following:

1. A brief statement of facts that each plaintiff proposes to prove in support of a claim.
2. A brief statement of facts that each defendant proposes to prove or rely upon as a defense thereto.
3. Similar statements as to any counterclaim, crossclaim, or third-party claim.
4. Any amendments required of the pleadings.
5. Any issue in the pleadings that is to be abandoned.
6. Stipulations of fact or, if unable to agree, a statement of matters on which any party requests an admission.
7. The details of the damage claimed or any other relief sought as of the date of the pretrial conference.
8. A listing of the documents and records to be offered in evidence by each side at the trial other than those expected to be used solely for impeachment indicating which documents the parties agree may be offered in evidence without the usual authentication.
9. A listing for each party of the names and specialties of experts the party proposes to call as witnesses.
10. Any other pretrial relief which an attorney will request.

The notice shall further state that the attorneys are required to complete prior to the date of the pretrial conference all discovery provided for in Rules 26-37 of the Federal Rules of Civil Procedure.

(c) The matter of a settlement may be discussed at the pretrial conference but the discussion shall not be made part of the Court record and shall not be mentioned in the proposed pretrial order, at the trial or in any motions or arguments.

(d) The judge may enter a pretrial order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of attorneys; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

ADDENDUM C

ADMINISTRATIVE PROCEDURE ACT

§ 244. Definitions.

For the purpose of this subtitle:

(a) "*Agency*" means any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except the Department of Parole and Probation, the Workmen's Compensation Commission, the State Accident Fund, the State Insurance Department of Maryland, the Public Service Commission, the Employment Security Board and the State Tax Commission.

(b) "*Rule*" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

(c) "*Contested case*" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

§ 251. Contested cases—Notice; hearing; records.

In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. The

notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

§ 252. Same—Rules of evidence; official notice.

In contested cases:

(a) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(b) All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(c) Every party shall have the right of cross-examination of the witnesses who testify, and shall have the right to submit rebuttal evidence.

(d) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them.

§ 253. Same—Examination of evidence by agency.

Whenever in a contested case, a majority of the officials of the agency who are to render the final decision have not heard the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.

§ 254. Same—Decisions and orders.

Every decision and order adverse to a party to the proceedings, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. A

copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed promptly to each party or to his attorney of record.

§ 255. Same—Judicial review.

(a) *Right to review.*—Any party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in fact, is entitled to judicial review thereof under this subtitle.

(b) *Where proceedings instituted; intervening parties.*—Proceedings for review shall be instituted in the circuit court of the county or in the Baltimore City Court, as the case may be, either where any party resides or has his or its principal place of business. The court, in its discretion, may permit other interested persons to intervene.

(c) *Stay of enforcement of decision.*—Repealed by Acts 1962, ch. 36, § 1.

(d) *Transmission of record.*—Repealed by Acts 1962, ch. 36, § 1.

(e) *Additional evidence.*—If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken in open court or before the agency upon such conditions as the court deems proper. In cases in which the additional evidence is taken before the agency, it may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) *Heard without a jury: testimony, oral argument and written briefs.*—The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(g) *Affirmance, remand, reversal or modification of decision.*—The court may affirm the decision of the agency or remand the case of further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Against the weight of competent, material and substantial evidence in view of the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(7) Unsupported by the entire record, as submitted by the agency and including de novo evidence taken in open court; or

(8) Arbitrary or capricious.

ADDENDUM D

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

ORDER

In the matter of: William Bryant
#129669, Maryland Penitentiary IGC No. 3599

The above named inmate wrote to the Inmate Grievance Commission on July 22, 1975 stating that on July 11, 1975 he was convicted by an Adjustment Team at the Maryland Penitentiary of possession of contraband (fermented juices), sometimes known as "jump steady", for which he was sentenced to thirty days segregation, concurrent to other sentences then being served in segregation, totaling two years. He claims he was not guilty because the claimed contraband was, in fact, orange juice; that the evidence before the Team was insufficient to justify a conviction and that the claimed "jump steady" was not produced at the adjustment hearing, having been destroyed by the institution prior to July 11, 1975.

On September 10, 1975 Chairman Boss, along with Commissioners Bennett, Fulton and Williams heard this case at the Penitentiary. Mr. Bryant was present with his inmate counsel, Fred "Jake" Hutchinson, and the institution was represented by Captain S. Rossman, CID. The Adjustment Team was represented by Mr. Ronald Woodwood, Classification Counselor III.

Findings of Fact

It is found that on July 10, 1975, about 9:25 a.m., Mr. Michael A. Cusick, CO I, was on duty on the South Wing of the Maryland Penitentiary and had been sent to the fourth tier to investigate a fire in the area of cell D-440, then occupied by inmate William Bryant. With Mr. Cusick was Officer A. Johnson, CO III, who had also been assigned by Sgt. Carpenter to investigate the fire.

According to separate adjustment reports filed by Officers Cusick and Johnson, they both smelled the odor of fermented juices emanating from cell D-440 and upon entering the cell they found approximately one-half gallon of what they believed from experience to be fermented juices in a bucket. Inmate Bryant was in the cell at that time and when questioned by Officer Johnson as to whether or not he had a fire behind the back plate in his cell, Mr. Bryant is reported to have replied that he was burning paper, rolled toilet tissue, to keep mosquitoes, etc. out of his cell.

Following confiscation of the suspected contraband, Officers Johnson and Cusick charged inmate Bryant with violation of Rule 7 which is stated in the Inmate Rule Book (June 1973) to include, in addition to intoxication, etc., the possession of fermented juices.

The Adjustment Team found Mr. Bryant guilty as charged, by unanimous vote, and based its finding on the officers' statements relating to their observations, detection and identification of the suspected contraband, even though, it is admitted, the evidence had been destroyed following its identification as "jump steady". Captain Rossman asserted that, as to "jump steady", the normal custom is to destroy it after identification, contrasted to the practice of retaining as evidence such suspected

contraband as marijuana, hard drugs, commercial liquors, etc., which are usually tested out by outside laboratory experts.

Mr. Ronald Woodward, a member of the Adjustment Team, told the Commission that at the adjustment hearing Officer Johnson told the Team that the juices were destroyed only after same were shown to Sgt. Stanton and had been identified as "jump steady" by Officers Cusick and Johnson.

In his defense before the Commission, inmate Bryant admitted having lighted some toilet tissue, in torch form, to keep off mosquitoes, bugs and roaches, but denied that the claimed contraband was "jump steady", stating that it was orange juice. However, Mr. Bryant failed to explain why so much orange juice was in his cell and why it was kept in a bucket. Through counsel, it was claimed that the destruction of the juices effectively deprived him of an important element of defense; i.e., the production of the claimed contraband as evidence at his adjustment hearing. Mr. Bryant also claimed he did not have available to him in his cell the fermenting agent(s) necessary to convert the orange juice to "jump steady", prison argot for fermented juices.

Counsel Hutchinson claimed that the accusing officers were not proven to be experts qualified to definitively identify the juices as "jump steady" and that in the absence of scientific proof, his client should not have been convicted.

CONCLUSIONS

The Commission concludes that the evidence before it was not sufficient to sustain complainant's contention

that his conviction should be reversed and relief granted; i.e., expungement from his base file. Although the Commission finds in this case the possible question as to justification of the charge, we do find that preservation of the evidence is not required in order to try the case and to convict on the testimony of the accusing officers. For this reason we conclude that a reversal by the Commission is not justified in this case. However, the Commission includes herein a strong recommendation that the institution should review its procedures in order to assure that identification of suspected contraband, such as fermented juices, be required by at least one qualified and experienced officer in addition to the accusing officer(s), whether or not the suspected contraband is to be retained as evidence or whether destroyed following identification.

DISPOSITION

Having found the grievance of inmate William Bryant to be lacking in merit, the Commission orders this case dismissed this 29th day of September, 1975.

/s/ James G. Boss
James G. Boss, Chairman

/s/James V. Bennett
James V. Bennett, Commissioner

/s/E. A. Fulton
E. A. Fulton, Commissioner

/s/Maceo M. Williams
Maceo M. Williams, Commissioner

STATE OF MARYLAND
INMATE GRIEVANCE COMMISSION

In the matter of: I.G.C. No. 3599 - William Bryant, 129669 Maryland Penitentiary

Bennett, J. V. - In Dissent

This matter came before four members of Maryland's Inmate Grievance Commission on September 10, 1975. The record notes that one of the members must go unpaid because of the budget crisis facing Governor Mandel.

The purpose of the hearing was to determine whether prisoner William Bryant had been denied his constitutional right of due process of law, confrontation of witnesses, and other fifth and fourteenth amendment rights when he was found guilty of possession of one quart of "jump-steady".

Three members of the Commission found the grievance lacking in merit and ordered the case dismissed. This member was erroneously listed as concurring in the result. This was apparently due, in part, to the fact there was, as usual, no discussion of the case among the members prior to the drafting of the order and also to the general confusion, din, and noise surrounding the proceedings.

The hearing was held in a basement room that had been scooped out during the construction of the Maryland Penitentiary when it was ceremoniously opened in 1804. It was then described as a sure deterrent to crime and a response to the influence of the Quakers and the growing humanitarianism of the times as a replacement for the whipping-post, the stocks, and the pillories, which

had failed to stop horse-stealing, adultery, the slothfulness and flight of indentured servants, crimes against nature, and wife-beating.[1]

Mr. Bryant was ushered into the room accompanied by his inmate counsel and before the Commission who were seated on rickety chairs of different heights squeezed behind a desk and table used ordinarily for a guard supervisor. This official was transferred to a corner of the room to answer a constantly ringing telephone, pass out messages and orders, and attend the coffee maker.

The door from the hallway opened frequently to allow some officer to leave a message or ask a question of the Captain of the Guard a Mr. I. Rossman, who was delegated to represent the institution in the proceedings.

These intrusions swept in a cacophony of noises, clanging barred doors, loud shouts, and frequent bangs which interfered with the tape recorder and from time to time required a cessation of proceedings.

The Chairman, James G. Boss, Esq., directed the aggrieved inmate, wearing a non-descript coverall, a hat denoting his membership in one of the Muslim groups, and his counsel, who was more fittingly garbed for the proceedings in jeans and a sweatshirt to take seats. The inmate counsel greeted the Commission members, all of whom he knew, with a pleasant smile and sat down beside his client after a dutiful nod to the Captain of the Guard. No love lost there, obviously. The Chairman introduced the members of the Commission and directed the petitioner to state his case.

[1] It is the recollection of the writer that not until the late and compassionate Governor Theodore McKeldon commuted the sentence of a Frederick, Maryland man to twenty lashes "well laid on" for wifebeating that the whipping post of colonial days was finally abolished.

A preliminary look at Mr. Bryant's institutional record disclosed that while he was serving a life term at the Maryland House of Correction, he had "walked away" while working in an outside warehouse. When he was recaptured, he was transferred to the penitentiary where he was sentenced to two years in solitary confinement in the prison's South Wing for escape. It is this section of the institution that confines inmates segregated for disciplinary infractions, self-protection, or because of "adjustment" problems. It has several times been the cause of inmate suits charging conditions are violative of the eighth amendment to the U.S. Constitution prohibiting cruel and unusual punishment, because of its lack of proper lighting, hot water in the cells, exercise facilities, screening, and ventilation. It has been found unsuitable for the incarceration of prisoners held in protective custody. No action, however, has been taken on a pending federal court suit declaring its use for any purpose as constituting cruel and unusual punishment.

On July 10, 1975, Mr. Bryant testified, he had lit a cigarette-size piece of toilet paper and stuck it in the chain that holds his hinged steel-bottomed bed to the wall. He did this he said to drive out the mosquitoes, gnats, and sundry other bugs that were viciously attacking him on a day when the outside temperature was in the nineties. Such fumigating devices were apparently not unusual and often tolerated by the Officer in Charge but, on this occasion, it created such a smudge that Bryant's cell neighbors shouted for relief. Thereupon one of the officers on duty heard the commotion above the usual yelling and banging in the 240-man cell block and sweated his way up three flights of stairs to where the petitioner was trying to shout his justification for the fumigation. The officer apparently was not impressed and

opened the cell door and doused the smudge. He incidentally also looked about and "shook down" the cluttered cell. In the process, he found a two-quart container half-full of something that was alleged to be orange juice. But the officer, having breathed in some of its aroma, decided it was fermented and confiscated it. As duty required, a report was filed with the disciplinary committee charging Bryant with being in possession of "fermented juices". He was found guilty and given thirty days confinement in segregation to run concurrently with the two-year sentence he was serving for escape.

Bryant's counsel thereupon stroked his beard and demanded the charge be expunged because the evidence was not produced at the disciplinary trial and his client was therefore obviously denied due process. Moreover, he contended that there was no proof the juice was fermented and could not, in fact, by any stretch of the imagination, be "jump-steady". Furthermore, it was violative of the Constitution's self-incrimination rule, the Miranda Rule, and the unreasonable search and seizure clause. He had apparently read or been fully briefed on the U.S. Supreme Court opinion in *Wolff vs. McDonnell* decided on June 26, 1974.[2]

The Chairman, after an unsuccessful attempt to brush aside the Constitutional arguments, called upon the Captain of the Guard, Mr. Rossman, to explain how the officer who filed the charge knew it was fermented and was, in fact, "jump-steady". The Captain insisted that any experienced and trained officer could determine this

[2] This decision indicated that prison inmates charged with serious misconduct required certain due process protection whenever penalties could be imposed resulting in forfeiture of credits; confinement in a disciplinary cell; administrative segregation; or any action which would tend to affect the inmate's release or parole date or have a bearing on a major change in the condition of confinement." (418 U.S. 539).

by its odor. He responded heatedly to a question whether the charging officer had tasted it.

> "No, of course he did not taste it. That might be dangerous. Just as anyone can tell whiskey good or bad by the smell so could an experienced officer, detect "jump-steady" by the odor."

What about vodka someone asked when the recorder was off while the noise in the corridor subsided.

When the hearing was resumed, the classification counselor, Mr. Ronald Woodward, who presided at the disciplinary hearing, was called upon to testify. He agreed he had accepted the words of the officer that the juice was fermented and therefore "jump-steady". "No", they had not taken into account any extenuating circumstances, the weather, or the fact that the petitioner had been let out of his cell for exercise only about a half-hour each week and then only to take a shower.

It was contended by the institution that even though suspected contraband is usually retained as evidence in such cases, it was not on this occasion because of its odor and lack of space to store it. Moreover, it was suggested the penalty was for only 30 days and made to run concurrent with his two-year segregation sentence. This seemed to arouse Mr. Bryant who contended vociferously he wanted the charge "expunged", taken off his record so possibly he could some day apply for parole. He did not want it to appear he had broken a rule, was addicted to strong drink, or did not know how to do time.

Moreover, Mr. Bryant's counsel contended the essential issue was "minimum due process" and that the disciplinary court had acted arbitrarily and capriciously and failed to comply with the uniform rules of evidence as lately promulgated by the U.S. Supreme Court.

After a few questions about the size of the vermin and the rats in the South Wing, to which the Captain of the Guards strenuously objected and caused the Chairman to shut off the tape recorder, the hearing was resumed and the Captain again was asked whether the officers were experts and how long the fermentation process had to proceed before it became contraband "jump-steady".

The Captain would not speculate on how much fermentation time was required but vowed: "Once you smell "jump-steady" you never forget it."

Mr. Bryant's counsel protested again this was not admissible evidence or proof, merely opinion, and besides even this was hearsay and threatened he was going to appeal the whole case to the Federal judge who had been petitioned to find confinement in the South Wing cruel and unusual punishment.

Thereupon, the Chairman concluded the Hearing and left for another engagement without discussing the case or his conclusions.

CONCLUSIONS

This member of the Commission cannot agree Mr. Bryant's petition is wholly without merit. The prisoners in the grim and stiflingly hot South Wing of the penitentiary in mid-summer are served their food in their 5′ x 8′ cells and are permitted to retain portions. They are also permitted to purchase items from the canteen including oranges and similar items when available and can consume these in whatever form they please. We have only the word of the officers that the orange juice Mr. Bryant had made was fermented – was, in fact, "jump-steady" of "proper proof". The officer making the charge was not called and no attempt was made to determine

customary habits of the inmates in this section of the prison or Mr. Bryant's usual behavior. He must have been cooperative at one time or he would not have been given a minimum custody assignment at the House of Correction. His alleged offense must be viewed in the light of the fact that he, a life-termer, had been given a two-year sentence to segregation in the South Wing for escape. He was not taken into court and charged with escape presumably because his life term could not be extended so he was committed to the South Wing as a deterrent to others who might attempt to escape. That he sought some surcease or relief from the conditions under which he was held is understandable and his eagerness to maintain a clear record commendable.

If the Grievance Commission is to fulfill the objectives the legislature had in mind of relieving tensions in Maryland's penal system and ameliorating harsh and unreasonable conditions and penalties, it must place the burden of proof on those who make the charges. Moreover, it must insist upon fairness in the disciplinary process wherever it comes to its attention. The voice of conscience, good sense, and understanding in correctional policies has long since progressed beyond the findings in *McCloskey vs. Maryland* which opined that:

> (337 Fed. 2nd 72) "In the gread mass of instances, however, the necessity for effective disciplinary controls is so compelling that judicial review of them is highly impractical and wholly unwarranted."

This and the long prevailing "hands-off" doctrine in dealing with penal policies has been repudiated by other federal courts and by the Supreme Court in *Wolff vs. McDonnell* previously cited. It has also been interred by a most exhaustive and persuasive opinion by Chief Justice

Richard Hughes of the New Jersey Supreme Court in Avant, et al vs. Commissioner of N.J. Department of Institutions and Agencies, decided June 23, 1975.

Also, it is well to remember that the accumulation of minor irritants, inflexible policies, and whimsical "straining at gnats" that are often the root cause of explosions in institutions filled with idle, hostile men trapped by circumstances beyond their control.

Also, it must not be forgotten that the responsibilities of the Commission and its jurisdiction is still unclear. Whether all cases alleging arbitrary and capricious action must first be brought before the Commission and all other state remedies exhausted before an action can be filed in Federal court has not yet been finally determined by the U.S. Supreme Court. It would seem, therefore, this case should have been more carefully investigated by the Commission on its own initiative, witnesses called if necessary, and full discussion of the issues encouraged. See McCray vs. Burrell (17 Criminal Law Reporter 2108).

The Commission cannot fail to recognize this situation or acquiesce in hasty "rule-book" actions and fulfill its responsibilities. Mr. Chief Justice Burger who has personally visited the Maryland Penitentiary has given life to the importance of this approach.

> "What I have been trying to express is my conviction that when society places a person behind walls we assume a collective moral responsibility to try to change and help that person. The law will define duties but I have more faith in what a moral commitment . . . can accomplish than I have in what can be done by compulsion of judicial decrees."[5]

[5] Address to National Conference on Corrections–December 1971.

DISPOSITION

It is our duty to expunge the Disciplinary Board's action in this case and undertake to right the arbitrary action of confining Mr. Bryant to the South Wing for two years for walking away from a minimum custody assignment. This sentence is totally out of proportion to the offense if one takes into account the surrounding circumstances and also the deprivations a prisoner suffers in the South Wing, not only in terms of living conditions, hygiene, stultifying idleness, barely edible diet, the loss of privileges, and psychological distress as well.

Mr. Bryant should be reclassified promptly and restored to usual privileges applying to prisoners in his category.

/s/James V. Bennett
James V. Bennett

ADDENDUM E

The median period of time which elapses between the receipt of a complaint by the Inmate Grievance Commission and the issuance of a final decision by the Commission or the Secretary is indicated by the following statistics:

First, during the period from June 1, 1972 to June 18, 1973, the Commission issued a total of 238 decisions. The average and median time a prisoner waited for a final decision on his or her grievance was 5 months.

Month of Final Decision[1]	Decisions Issued[2]
1	1
2	16
3	54
4	43
5	37
6	22
7	17
8	10
9	5
10	4
11	5
12	3
13	1

[1] The Month (or Week) of Final Decision is the month or week in which the final decision was made after a complaint was initially received by the Commission. For example, during the first period *supra*, the Commission issued one decision within one month of receiving the grievance, sixteen decisions within two months of receiving the grievances, fifty-four decisions within three months of receiving the grievances, etc.

[2] The Commission issued 20 decisions during the first period and 4 decisions during the second period where no date of receipt was readily apparent from the records of the Commission. Those 24 decisions are therefore not included in the statistics.

Second, during the period from November 19, 1973 to February 20, 1974, the Commission issued a total of 127 decisions. The average time which the Commission required to render a decision was 26 weeks from the date on which the Commission initially received a complaint. The median time was 22 to 24 weeks:

Week of Final Decision	Decisions Issued
1-3	0
4-6	0
7-9	1
10-12	5
13-15	14
16-18	18
19-21	19
22-24	20
25-27	13
28-30	7
31-33	4
34-36	6
37-39	3
40-42	3
43-45	4
46-48	0
49-51	0
52-54	1
55-57	1
64	1
67	2
68	1

ADDENDUM F

TO WARDENS AND SUPERINTENDENTS:

Punitive or isolation cells will be used only when an inmate is emotionally disruptive and will be used only as a cooling off period, which can entail from one hour up to the time the inmate is reasonably calm enough to go to a segregation area without becoming disruptive. The punitive or isolation cells are not to be used as a *routine punishment area*.

Institutions that do not have mental observation cells may use the punitive or isolation cells for the purpose of housing inmates who are mentally disturbed, but only upon the approval of a psychologist or psychiatrist.

In the absence of the psychologist or psychiatrist, an inmate who is displaying mentally disturbed behavior may be placed in an isolation cell for the inmate's own safety, or that of the inmate population, until the psychologist/psychiatrist is notified. The psychologist/psychiatrist should be contacted immediately after the confinement of the inmate, and the inmate should be evaluated within a twenty-four (24) hour period.

/s/James Jordan
James Jordan
Deputy Commissioner